FILED
MAR 4 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

Nos. 134-36

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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March 4, 1942.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Chicago and North Western Railway Company, Debtor, respectfully prays the issuance of writs of certiorari to review the judgments of the United States

Circuit Court of Appeals for the Seventh Circuit entered on February 9, 1942, affirming the orders and decrees of the District Court for the Northern District of Illinois, which had approved the plan of reorganization for the Debtor certified by the Interstate Commerce Commission, denied the motion of the Debtor to refer the plan back to the Interstate Commerce Commission for a determination and certification of values, and confirmed the said plan of reorganization.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) Nature of the proceedings.

On June 28, 1935, petitioner, Chicago and North Western Railway Company, a railroad corporation operating as a common carrier of passengers and property in the states of Illinois, Wisconsin, Michigan, Minnesota, Iowa, Nebraska, South Dakota, North Dakota, and Wyoming, filed its petition (Tr. 2-7) in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking to reorganize under Section 77 of the Bankruptcy Act. A plan of reorganization approved by the Interstate Commerce Commission was filed in said Court on December 19, 1939 (Tr. 3503); a supplemental report and order (Tr. 3661) was filed April 8, 1940, in said Court by the Commission, modifying said plan of reorganization and approving the plan as modified.

On October 12, 1940, the District Court entered an order approving said plan of reorganization (Tr. 5072), and also entered an order (Tr. 5093) denying the motion of this petitioner, Chicago and North Western Railway Company, hereinafter referred to as the Debtor, to refer the plan back to the Interstate Commerce Commission for

determination and certification of values, in accordance with the requirements of the final paragraph of Section 77 (e). On June 27, 1941, the District Court entered its decree (Tr. 5591) confirming said plan of reorganization.

On February 9, 1942, the United States Circuit Court of Appeals for the Seventh Circuit affirmed the orders and decree above referred to and overruled all objections by appellants to the plan of reorganization. The principal ground of affirming the orders and decree, distinguishing the grounds for reversal in the case of *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 124 F. (2d) 754, decided December 4, 1941, by the same Court, is that in the instant case the creditors had received the plan and voted almost unanimously their approval of such plan. (Tr. 5809)

(b) Historical statement of plan of reorganization.

The petition of the Debtor, filed June 28, 1935, stated that on the first day of May, 1935, interest on Debtor's convertible bonds of 1949 became due and payable; that Debtor was without funds with which to pay said interest, had no means of procuring funds with which to meet interest charges, and desired to effect a plan of reorganization pursuant to Section 77, Chapter VIII of the Acts of Congress relating to bankruptcy. (Tr. 2-7) On the same day the District Judge entered an order approving the said petition as properly filed under said Acts and directing the Debtor, pending further decision of the Court, to manage, operate, etc., the railroad and properties of the Debtor wherever situated. (Tr. 7-12)

Later, trustees were appointed and Honorable Charles M. Thomson, Trustee, is now in custody of, and operating, the properties of the Debtor. The Chicago and

North Western Railway Company, only, filed a petition for reorganization. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, hereinafter referred to as the Omaha, is unable to pay its debts as they mature, but all of its funded debt, except $353,000 of equipment-trust certificates, is owned by the Chicago and North Western Railway Company, and the latter has extended it the needed credits. The Chicago and North Western Railway Company owns $17,456,400 of the $18,556,767 of the outstanding common stock, $10,469,600 of the $11,-259,300 of outstanding preferred stock, $144,000 (as of December 31, 1937) of the equipment-trust certificates, and the entire issue, $46,186,000, of the first mortgage bonds of the Omaha. It also owns the entire issue, $50,000, of the capital stock and the entire issue, $1,350,000 (matured 1920), of the first mortgage bonds of the Escanaba, Iron Mountain & Western Railroad Company, which mortgage is the latter's only funded debt. It had no proprietary interest in the Oshkosh Transportation Company at the time of the hearings on approval of the plan, but on January 28, 1941, was granted leave to purchase all of the outstanding capital stock of said company and has since done so. (Tr. 5275) The Chicago, St. Paul, Minneapolis & Omaha Railway owns $5,000 of the general mortgage bonds of the Chicago and North Western Railway Company. The Escanaba, Iron Mountain & Western Railroad Company and the Oshkosh Transportation Company are operated under lease by the North Western. The Chicago, St. Paul, Minneapolis & Omaha Railway Company is separately operated. (Tr. 3518-19)

As of January 1, 1938, the securities of the four companies issued or assumed and actually outstanding in the hands of the public, were as follows (Tr. 3519-20):

General Mortgage Bonds of 1987	$132,011,500
Fifteen-Year 6½% Secured Bonds matured 1936	14,775,000
First and Refunding Mortgage Bonds of 2037	47,822,000
Public Works Administration Notes	1,360,000
Twenty-Year Convertible Bonds of 1949	72,335,000
Equipment Obligations	14,973,000
Notes to Reconstruct Finance Corporation	42,250,133
Demand Loan for Sioux City Bridge Company	518,961
5% Notes to 16 Banks	4,439,690
Notes to Railroad Credit Corporation	653,681
Milwaukee & State Line Bonds of 1941	2,500,000
Manitowoc, Green Bay & North Western Railway First Mortgage 3½% Bonds of 1941	3,750,000
St. Paul Eastern Grand Trunk Railway First Mortgage 4½% Bonds of 1947	1,120,000
Milwaukee, Sparta & North Western First Mortgage 4% Bonds of 1947	15,000,000
Des Plaines Valley Railway First Mortgage 4½% Bonds of 1947	2,500,000
St. Louis, Peoria & North Western Railway First Mortgage 5% Bonds of 1948	10,000,000
Sioux City & Pacific Railroad First Mortgage 3½% Bonds matured 1936	4,000,000
Chicago, St. Paul, Minneapolis & Omaha Railway Equipment Obligations	353,000
Total principal amount of debt securities	$370,361,965

Capital stock outstanding in the hands of the public as of January 1, 1938, was as follows (Tr. 3520):

Chicago and North Western Railway Company Preferred Stock	$ 22,395,000
Chicago and North Western Railway Company Common Stock	158,440,300
Chicago, St. Paul, Minneapolis & Omaha Railway Company Preferred Stock	789,700
Chicago, St. Paul, Minneapolis & Omaha Railway Company Common Stock	1,100,300
Oshkosh Transportation Company Common Stock	70,000
	$182,795,300

The foregoing list does not include funded debts matured and unpaid, which have not been presented for payment, amounting to $12,500 as of said date, nor does

it include stock liability for conversion, scrip, and premium on capital stock. (Tr. 3521)

The total of securities outstanding in the hands of the public, exclusive of the Oshkosh Transportation Company, of amounts owed to general creditors, and of interest matured and still unpaid, is $615,742,758 as of January 1, 1939, and apparently represents all liabilities actually outstanding which must be taken into account in the new capital structure and is exclusive of claims for additional interest not accrued on the books. (Tr. 3521)

The notes to the Reconstruction Finance Corporation were secured as of December 31, 1937, by a pledge of Chicago and North Western securities in the aggregate amount of $49,769,000, of securities of the Chicago, St. Paul, Minneapolis & Omaha aggregating $45,330,000, and of various other railroad bonds, stocks, and capital stock of the Superior Coal Company aggregating $6,714,800, or a total collateral of $101,813,800. (Tr. 3525)

The $4,439,690 of 5 per cent notes to the various banks, which matured in 1936, are secured by a pledge of Chicago and North Western Railway Company bonds in the aggregate amount of $16,108,000 and Union Pacific Railroad Company preferred stock aggregating $2,085,000, or a grand total of such collateral of $18,193,000. (Tr. 3526)

The $653,681 of notes to the Railroad Credit Corporation, which matured in 1935 and 1936, are secured by a pledge of Chicago and North Western first and refunding bonds of 2037 in the amount of $6,021,000 and Chicago, St. Paul, Minneapolis & Omaha Railway Company bonds in the amount of $1,000,000, or a total collateral of $7,021,000. These notes were further secured by the interest of the Debtor and of the Omaha in the fund administered under the marshalling and distributing plan,

and by the equity of the Debtor in Reconstruction Finance Corporation collateral above set forth. (Tr. 3526)

The Debtor filed with the Commission a plan of reorganization to be made effective January 1, 1938, under which the present corporate organization would be retained. (Tr. 3527)

Under the Debtor's proposed plan, the outstanding securities of the corporation immediately following reorganization would be as follows (Tr. 3536):

Equipment-trust certificates	$ 14,973,000	
Public Works Administration loan	1,360,000	
Four per cent secured serial notes	50,000,000	
		$ 66,333,000
Four per cent income bonds		132,409,219
Total interest bearing securities		$198,742,219
Class A four per cent preferred stock	$132,409,218	
Class B four per cent preferred stock	88,808,301	
		$221,217,519
Class C four per cent preferred stock		11,197,500
Total preferred stock		$232,415,019
No par value common stock		39,610,050
Total stock		$272,025,069
Total capitalization		$470,767,288

The plan of reorganization proposed by the Life Insurance and Savings Bank Group Committees contemplated the retention of control of the Omaha by the reorganized company through the ownership of Omaha securities. (Tr. 3537)

Under the committees' plan, the capitalization of the reorganized company upon consummation of the plan as of January 1, 1938, would be approximately as follows (Tr. 3538-39):

UNDISTURBED OBLIGATIONS:	
Equipment obligations	$ 14,973,000
Public Works Administration loan (after curing defaults)	1,190,000
Total undisturbed	$ 16,163,000
NEW SECURITIES ISSUED:	
10-year collateral-trust note	$ 700,000
15-year collateral-trust notes	2,914,000
New first mortgage bonds, series A	* 122,152,000
New general mortgage convertible income bonds, series A	104,799,000
New preferred stock, series A	91,699,000
New common stock, without par value, shares	* 1,110,780

* Including securities issued to finance subsequent expenditure in the rehabilitation and improvement program.

Assuming a value of $100 per share of the common stock, the aggregate capitalization would be $449,505,000. (Tr. 3539)

The plan of reorganization approved by the Commission and by the Court is summarized by the Commission as follows (Tr. 3676):

Fixed interest obligations	Principal	Fixed Interest
Undisturbed obligations	$ 12,698,000	$ 470,095
10-yr. serial note to R.C.C.	663,000	26,520
15-yr. serial notes to banks	3,296,000(a)	82,400
15-yr. secured notes to R.F.C.	25,000,000(a)	625,000
Sioux City divisional bonds	4,000,000	160,000
Des Plaines divisional bonds	2,500,000	100,000
First and general mtge. bonds, A	55,762,556(a)	1,394,064
First and general mtge. bonds, B (@ 4%)	13,100,000	524,000
	$117,019,556	$3,382,079

(a) This issue bears 4½% interest, of which 2½% will be fixed and 1½% contingent but commutable into fixed interest.

Other requirements	Principal	Charges or Dividends
Sinking fund (divisional bonds).....		$ 32,500
Additions & betterments fund (minimum)		2,500,000
15-yr. serial notes to banks.....	(a)	49,440
15-yr. secured notes to R.F.C.....	(a)	375,000
First and general mtge. bonds, A.....	(a)	836,438
Second mtge. income bonds, A.....	$105,058,904	4,727,651
Sinking fund (income bonds).....		525,295
Total fixed and contingent.....	$222,078,460	$12,428,403
Preferred stock	$106,996,076	$ 5,349,804
Common stock	120,899,773	
Total capitalization	$449,974,309	
Total charges ahead of dividends on common stock		$17,778,207
(Ratio of debt to total capitalization.....	49.35%)	

Opposite this page we reprint for convenience a table showing outstanding obligations and stock of the Debtor, and the distribution of new securities taken from the Commission's report. (Tr. 3677)

The issues involved in these consolidated appeals arise under the orders of the District Court (a) refusing to remand the proceedings to the Commission for determination and certification of value, (b) approving the plan of reorganization as modified, and (c) confirming the plan of reorganization. The issues raised by the appeals from the approval and confirmation orders are practically identical, with the exception that in the appeal from the confirmation order there is the additional question as to whether the submission by the Commission to the creditors of the plan of reorganization, as approved by the Court, and the approval and consent by such creditors, was in accordance with law. (Tr. 4924-25)

The District Court held hearings on objections to the plan of reorganization and on claims for equitable treatment by the Debtor in respect thereto, on June 24-27, 1940. (Tr. 4084) Oral and documentary evidence was introduced before the Court in addition to the record made before the Interstate Commerce Commission.

A motion by the Debtor (Tr. 5562) to refer the plan back to the Interstate Commerce Commission for a determination and certification of value was denied by the District Court. The orders of the District Court and its opinion are set forth in the record at pages 5569 and 5583.

Opposition of the creditor interests and of the Interstate Commerce Commission to payment of the costs out of the estate resulted in a delay in perfecting the appeal from the orders of the District Court approving the plan and denying the motion to refer the plan back to the Interstate Commerce Commission for a determination and

Outstanding Obligations and Stock

		Amount as of December 31, 1938		
		Principal	Unpaid Interest	Total
1.	Equipment trusts	$ 11,678,000	$	$ 11,678,000
2.	General 3½%	31,316,000	4,019,096	35,335,096
3.	General 4%	30,554,000	4,481,355	35,035,355
4.	General 4½%	5,791,000	955,515	6,746,515
5.	General 4¾%	23,663,000	4,121,384	27,784,384
6.	General 5%	40,695,000	7,461,022	48,156,022
7.	Secured 6½%	14,775,000	3,681,437	18,456,437
8.	Sioux City 1st 3½%	4,000,000		4,000,000
9.	State Line 1st 3½%	2,500,000	350,000	2,850,000
10.	Manitowoc 1st 3½%	3,750,000	525,000	4,275,000
11.	St. Paul Eastern 1st 4½%	1,120,000	201,600	1,321,600
12.	Sparta 1st 4%	15,000,000	2,300,100	17,300,100
13.	Des Plaines 1st 4½%	2,500,000		2,500,000
14.	Peoria 1st 5%	10,000,000	2,000,000	12,000,000
15.	First and refunding 4½%	32,572,000	5,252,235	37,824,235
16.	First and refunding 5%	15,250,000	2,732,343	17,982,343
17.	P.W.A. loan (after curing defaults)	1,020,000		1,020,000
18.	R.C.C. loan	653,681	9,805	663,486
19.	R.F.C. loan	42,250,133	6,934,772	49,184,905
20.	Banks' loan	4,439,690	590,258	5,029,948
21.	Convertible debentures, 4¾%	72,335,000	14,316,302	86,651,302
22.	Sioux City Bridge Co. loan, 4¾%	518,961	76,415	595,376
23.	General creditors (estimated)	5,000,000		5,000,000
24.	New money (for rehabilitation program)			
25.	Total debt	371,381,465	60,008,639	431,390,104
26.	Preferred stock	22,395,000		22,395,000)]
27.	Common stock	158,440,200		158,440,200)]
28.	Total stock	180,835,200		180,835,200

Totals—Reorganized Company

(a) Estimated proceeds from sale of
(b) Bears 4% interest, of which 2½

CHICAGO AND NORTH WESTERN RAILWAY COMPANY REORGANIZATION

Finance Docket No. 10881

DISTRIBUTION OF NEW SECURITIES

Total	Cash or equivalent (a)	Undisturbed	4%, 10-yr. serial secured notes to R.C.C.	15-yr. secured serial notes to Banks (b)	15-yr. secured notes to R.F.C. (b)	Sioux City & Pacific Division first mtge. bonds, 4%
$ 11,678,000	$	$11,678,000	$	$	$	$
35,335,096						
35,035,355						
6,746,515						
27,784,384						
48,156,022						
18,456,437						
4,000,000						4,000,000
2,850,000						
4,275,000						
1,321,600						
17,300,100						
2,500,000						
12,000,000						
37,824,235						
17,982,343						
1,020,000		1,020,000				
663,486			663,000			
49,184,905					25,000,000	
5,029,948	1,733,948			3,296,000		
86,651,302						
595,376						
5,000,000						
431,390,104						
22,395,000)	Equity found to					
158,440,200)	have no value					
180,835,200						
any	1,733,948	12,698,000	663,000	3,296,000	25,000,000	4,000,000

from sale of U.P R.R. Co. stock pledged under present loan.
of which 2½% will be fixed and 1½% contingent but commutable into fixed interest.

Des Plaines Valley Division first mtge. bonds, 4%	First and general mtge. bonds series A (b)	First and general mtge. bonds series B	Second mtge. convertible income bonds series A, 4½%	Preferred stock, series A, 5%	Common Stock, no-par (stated at $100 a share)	Total allowed
$	$	$	$	$	$	$11,678,000
	6,200,568		14,499,308	13,371,932	1,252,640	35,324,448
	6,171,908		14,360,380	13,260,436	1,252,714	35,045,438
	1,187,155		2,768,098	2,548,040	243,222	6,746,515
	4,898,241		11,381,903	10,506,372	993,846	27,780,362
	8,464,560		19,737,075	18,190,665	1,749,885	48,142,185
	3,693,750		8,599,050	7,934,175	753,525	20,980,500
						4,000,000
	777,500		1,112,500	960,000		2,850,000
	1,406,250		1,496,250	1,372,500		4,275,000
					1,321,600	1,321,600
	3,600,000		4,065,000	4,950,000	4,680,000	17,295,000
2,500,000						2,500,000
	4,280,000		3,880,000	3,840,000		12,000,000
	4,950,944		7,491,560	9,836,744	15,536,844	37,816,092
	2,348,500		3,553,250	4,081,750	7,396,250	17,979,750
						1,020,000
						663,000
	7,783,180		12,114,530	15,543,462	23,259,836	83,701,008
						5,029,948
					45,860,390	45,860,390
					329,021	329,021
					3,170,000	3,170,000
		13,100,000			13,100,000	26,200,000
2,500,000	55,762,556	13,100,000	105,058,904	106,996,076	120,899,773	451,708,257

certification of values, until July 16, 1941, the Debtor having had no funds of its own with which to prosecute such appeals.

During that period of approximately nine months, the Debtor had been actively trying to restrain the confirmation until the orders appealed from had been considered by the Circuit Court of Appeals. On April 3, 1941, it filed a motion in the Circuit Court of Appeals (Tr. 5713-17), seeking an order directed to the Interstate Commerce Commission to withhold certification of the results of the balloting by the creditors on the plan of reorganization. That motion was denied on April 11, 1941. (Tr. 5743-45) Another motion was filed on May 29, 1941, with the Circuit Court of Appeals (Tr. 5752-57), to stay all proceedings leading to confirmation until the decision of the questions involved in the appeals from the orders of October 12, 1940. The Circuit Court of Appeals denied said motion on June 18, 1941. (Tr. 5784)

The results of the balloting having been certified by the Commission and filed with the District Court on May 16, 1941, the Court proceeded to hold a hearing on the confirmation of the plan, at the beginning of which the Debtor filed a petition for rejection of such certification; the motion for such rejection was denied by the District Court on June 23, 1941. (Tr. 5558, 5561) Prior to the beginning of the hearing, Debtor had filed a motion to stay confirmation which was denied that same day, June 23, 1941. (Tr. 5374, 5375) It also filed another motion to refer the case back to the Interstate Commerce Commission, which motion was denied June 27, 1941. (Tr. 5583) The order of confirmation was also entered on June 27, 1941. (Tr. 5591)

To summarize, appeals were taken by the Debtor from the orders of October 12, 1940, approving the plan of re-

organization and denying the motion of the Debtor to refer the plan back to the Interstate Commerce Commission for a determination and certification of value of the Debtor's properties, and from the decree of June 27, 1941, confirming said plan of reorganization.

Eighteen appeals in the aggregate were heard by the United States Circuit Court of Appeals for the Seventh Circuit arising out of the reorganization proceedings, and were disposed of in the opinion of the Court of February 9, 1942. (Tr. 5785-5816) On February 20, 1942, the United States Circuit Court of Appeals entered an order that the mandates of that Court be stayed for a period of sixty days, and that if within such sixty days there is filed with the Clerk of said Court a certificate of the Clerk of the Supreme Court certifying that the certiorari petition, record, and brief have been filed, the stay of mandate shall continue until final disposition of this matter by the Supreme Court. (Tr. 5825)

This petition for writs of certiorari is from the order entered by the United States Circuit Court of Appeals for the Seventh Circuit on February 9, 1942, affirming the order of the District Court of October 12, 1940, approving the plan of reorganization, affirming the order of October 12, 1940, denying Debtor's motion to refer the plan of reorganization back to the Interstate Commerce Commission for a determination and certification of value of Debtor's properties, and affirming the order of June 27, 1941, confirming the plan of reorganization.

(c) The primary issue.

The primary issue in this appeal is whether the Circuit Court of Appeals is correct in holding that it will not go beyond the expressed assent and approval of the bondholders to ascertain whether or not a plan of reorganiza-

tion is fair and equitable. That Court in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 124 F. (2d) 754, held on December 4, 1941, that the Court could not pass intelligently on the fairness of the plan of reorganization and the reasonableness of the allocation of new securities among holders of old securities because the Interstate Commerce Commission had failed to make findings of values in sufficient detail. In the instant case the Court said (Tr. 5805):

> "While fairness is a somewhat relative term and is not measurable, in its practical application, with mathematical certainty, courts will not go beyond the expressed assent and approval of the bondholders to ascertain whether fairness in distribution attained the goal of perfection. If the creditors who are to share an insolvent estate understandingly agree on a division thereof, the problem of the court has been solved."

As further illustration of the views of the Circuit Court of Appeals, we quote the following paragraph from its decision herein of February 9, 1942 (Tr. 5808):

> "It is not a question of a necessary majority (two-thirds). The majority in each group, in the case before us, was far greater than the minimum requirement. It is a question of whether the report of the I.C.C., which was full and complete, fair and open, but lacking in one respect,—failure to make specific findings of values,—may, or should, be approved without said findings. In fact, the issue may be stated even more strongly against the minority. Does not the vote of approval supply the proof that the report of the Commission contained the evidence, and the Commission's finding sufficiently states the facts, to justify us in holding that separate and more detailed findings are unnecessary? We think it does."

That the Circuit Court of Appeals failed to exercise an informed and independent judgment to determine whether the plan is fair and equitable, is shown by these two paragraphs of the opinion (Tr. 5809):

> "Could these bondholders not waive a requirement that the I.C.C. fix value of the property covered by each mortgage? We think they could. Could they not waive the necessity of the I.C.C.'s making more specific findings? They could, and did. No objecting creditor, *at the time*, objected to the I. C. C.'s failure to separate its findings or to make separate coverage of specific property. If they felt the task was too great, or the results no better than the deductions which the apportionment of new securities indicated, we would not condemn them for their neglect, but say they were practical men who realized that additional specific findings would not change the result nor make the court's study much more intelligent.
>
> "In short, we hold, the approval of the plan differentiates this case from the Milwaukee case. It was an equivalent of a waiver of more specific findings by all who approve the plan. It also supplied the proof that the report gave the bondholders sufficient facts to understand and appraise the worth of the plan."

The Court of Appeals, while citing the decision of this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 84 L. Ed. 110, in support of (1) its holding that the Court is required to exercise its judgment upon the soundness of estimated revenues in a normal year, and (2) the statement that the bankruptcy amendment of 1932 was intended to defeat the efforts of nuisance value makers, who were no more popular with Congress than they had been with the courts (Tr. 5808), wholly overlooked and ignored that portion of the opinion by Mr. Justice Douglas in that case, wherein it is stated (page 114-5 of 308 U. S.):

> "At the outset it should be stated that where a plan is not fair and equitable as a matter of law it cannot

be approved by the court even though the percentage of the various classes of security holders required by §77B(f) for confirmation of the plan has consented. It is clear from a reading of §77B(f) that the Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be 'fair and equitable.' The former is not a substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the court's protection. Accordingly the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one. This is in line with the decision of this Court in *Taylor* v. *Standard Gas & E. Co.*, 306 U. S. 307, 83 L. Ed. 669, 59 S. Ct. 543, 38 Am. Bankr. Rep. (N.S.) 692, which reversed an order approving a plan of reorganization under §77B, in spite of the fact that the requisite percentage of the various classes of security holders had approved it, on the ground that preferred stock of the debtor corporation was inequitably treated under the plan. The contrary conclusion in such cases would make the judicial determination on the issue of fairness a mere formality and would effectively destroy the function and the duty imposed by the Congress on the district courts under §77B. That function and duty are no less here than they are in equity receivership reorganizations, where this Court said, 'Every important determination by the court in receivership proceedings calls for an informed, independent judgment.' *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436, 77 L. Ed. 1300, 1305, 53 S. Ct. 678, 88 A. L. R. 1231.

"Hence, in this case the fact that 92.81% in amount of the bonds, 99.75% of the Class A stock, and 90% of the Class B stock have approved the plan is as immaterial on the basic issue of its fairness as is the fact that petitioners own only $18,500 face amount of a large bond issue."

It thus clearly appears that the decision of the Circuit Court of Appeals was directly in conflict with the rule laid down in the *Los Angeles Lumber Products* case, *supra*.

The Debtor contended in the Circuit Court of Appeals that the decree of confirmation was erroneous in that the acceptances of the plan had been made and procured by means forbidden by law. That question is not discussed or referred to in the opinion of the Circuit Court of Appeals. In that opinion there is a "Table on Vote of Various Class of Creditors on Plan," showing the class, name of security, total amount of each outstanding, the amount of each security voted, and the percentage of the vote in favor of the plan, but there is no showing of ratio of securities held by the Insurance Group and the Savings Bank Group, to the total outstanding securities, nor the percentage of such holdings to the total vote for acceptance of the plan. Nor does the opinion of the Court note that, as hereinafter appears in detail, only 62.7 per cent of creditors authorized to vote on the plan, in the aggregate, voted to accept the plan and of these the Life Insurance Group and Savings Bank Group held 53 per cent.

Certainly a vote of acceptance under the circumstances shown in this record is no substitute for the informed, independent judgment of the Court in determining that a plan of reorganization is fair and equitable.

The principal issues involved in the Debtor's appeals from the orders refusing to remand the proceedings to the Commission to determine value, approving the plan, and confirming the plan, may be briefly stated as follows:

1. The District Court erred in not remanding the proceedings to the Commission for a determination and certification of value. (Tr. 5093)

2. The District Court should have sustained the objections filed by the Debtor to the plan of reorganization. (Tr. 4000-16)

   a. Capitalization reserved for rehabilitation and improvement programs should be available for other purposes.

b. The Commission's forecast of earnings in a normal year is wholly unfounded and unacceptable as a basis for capitalization of the reorganized company.

c. The Commission erred in refusing to consider a plan of consolidating the properties of the Debtor and of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

d. The plan of reorganization should be effective as of the date of filing of the petition. (Tr. 5111-15)

3. No interest is allowable on a claim after the date upon which the petition for reorganization was filed in the District Court.

4. The Court erred in holding that the Commission's failure to advise creditors (in submitting the plan of reorganization for balloting) that appeals had been taken and were pending from the order of the District Court approving the plan of reorganization, did not invalidate the results of the balloting.

5. The Court erred in holding that the Savings Bank Group and the Insurance Company Group, holding bonds in large amounts of each of the several classes of creditors, were entitled to vote all their holdings in each class affirmatively and to have the same counted as acceptance of the plan of reorganization.

6. The plan of reorganization as approved and confirmed takes the property of the Debtor, of the holders of its convertible bonds of 1949, and of its preferred and common stockholders, without due process of law, and takes that property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

7. The Court erred in excluding the document marked "Debtor's Exhibit 74, For Identification," offered by the Debtor through its witness, Patrick B. McGinnis. (Tr. 4921-25)

Opinions below.

The original report and order of the Interstate Commerce Commission dated December 12, 1939, is reported at 236 I. C. C. 575 (Tr. 3503), and the supplemental report and order decided April 2, 1940, is reported at 239 I. C. C. 613 (Tr. 3661). The opinion of the District Court approving the plan of reorganization and denying Debtor's motion to refer the plan back to the Commission for a determination of values, is reported at 35 F. Supp. 230. (Tr. 5007-5055) The opinion of the Circuit Court of Appeals has not yet been reported.

Jurisdictional statement.

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A. Sec. 347 (a).) The judgments of the Circuit Court of Appeals sought to be reviewed were entered on February 9, 1942.

Statutes involved.

The issues involve the construction and application to the facts of this case of Section 77 of the Bankruptcy Act as amended. (11 U. S. C. A. Sec. 205.)

Questions presented.

1. May the Court confirm a plan of reorganization solely on the ground that the creditors have accepted such plan of reorganization?

2. Under the circumstances disclosed of record, should the Court require the Interstate Commerce Commission to make findings of values as required by the final paragraph of Section 77(e)?

3. Should the District Court have sustained Debtor's objections to the plan of reorganization?

4. Is interest allowable on a claim after the date upon which the petition for reorganization was filed in the District Court?

5. Does the Commission's failure to advise creditors (in submitting the plan of reorganization for balloting) that appeals had been taken and were pending from the order of the District Court approving the plan of reorganization, invalidate the acceptances by creditors of such plan of reorganization?

6. Did the District Court err in holding that the Savings Bank Group and the Insurance Company Group, holding bonds in large amounts of each of the several classes of creditor groups, were entitled to vote all their holdings in each class affirmatively and to have the same counted as acceptances of the plan of reorganization?

7. Does the plan of reorganization, as approved and confirmed, take the property of the Debtor, of the holders of its convertible bonds of 1949, and of its preferred and common stockholders, without due process of law, and take that property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States?

8. Did the District Court err in excluding the document marked "Debtor's Exhibit 74, For Identification," offered by the Debtor through its witness, Patrick B. McGinnis?

Reasons relied on for the allowance of the writs.

1. The Circuit Court of Appeals has decided in this case an important question of Federal law arising in the administration of Section 77 of the Bankruptcy Act, which has not yet been but should be settled by this Court. In

affirming the decree of the District Court, the Circuit Court of Appeals definitely holds that a vote of the creditors relieves the Court of the necessity of determining, independent of such confirmation, that the plan of reorganization is fair and equitable. The Court even goes so far as to hold that it assumes the responsibility to represent creditors who did not vote and who have neither specifically objected to nor approved the plan, and, accepting that responsibility, votes the interests of such creditors in favor of the plan. The Court of Appeals voted the interest of the creditors in favor of the plan, as it states in its opinion, because (a) all the creditors of each group who have voted are overwhelmingly in favor of it, and (b) such a plan, if consummated, terminates these lengthy proceedings. The holding of the Circuit Court of Appeals in this respect is squarely in violation of the rule laid down by this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 84 L. Ed. 110.

2. The decision in the instant case by the Circuit Court of Appeals is squarely in conflict with the holding of the same Court in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor,* decided December 4, 1941, 124 F. (2d) 754 (pending in this Court in Docket Nos. 875-883), reversing an order of the District Court approving a plan of reorganization, because the Interstate Commerce Commission had failed to make findings of fact sufficiently detailed to enable the Court to pass independently on the fairness of the plan of reorganization and the reasonableness of the allocation of new securities among holders of old securities. In that case the Circuit Court of Appeals reversed the decree of the District Court approving the plan, and remanded the proceedings to the Commission for necessary findings of value. The same failure to make necessary

findings of value exists in the case of the Debtor as in the case of the Milwaukee. The opinion of the Circuit Court of Appeals undertakes to differentiate the two cases by pointing out that the various groups of creditors had approved the plan of reorganization of the Debtor. No ballot on the plan of reorganization in the *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* case was taken because the Circuit Court of Appeals itself entered an order restraining such balloting until the determination of the appeals from the order of approval. In the case of this Debtor, both the District Court and the Circuit Court of Appeals denied petitions of the Debtor for an order prohibiting further proceedings until the appeals from the order of approval by the District Court had been determined, and specifically for an order restraining the certification by the Interstate Commerce Commission of the results of the ballot.

The decision in the instant case is also squarely in conflict with the holding of the Circuit Court of Appeals for the Ninth Circuit in the case of *In re The Western Pacific Railroad Company, Debtor,* 124 F. (2d) 136, decided November 28, 1941, wherein the decree of the District Court approving the plan of reorganization for that railroad was reversed and remanded with directions to dismiss or, on motion of any party in interest, refer the proceeding back to the Commission for further action, the Commission having failed to make the necessary findings of value. That case is also before this Court on petition for writs of certiorari.

3. The failure and refusal of the Circuit Court of Appeals to require a determination and certification of values of the Debtor's properties is squarely in conflict with the final paragraph of Section 77(e) and of the decision of this Court in *Consolidated Rock Products Company* v.

DuBois, 312 U. S. 510, 85 L. Ed. 982, where this Court affirmed a decision of the Circuit Court of Appeals for the Ninth Circuit, which had reversed a decree of the District Court approving a plan of reorganization under Section 77B. In the opinion in that case by Mr. Justice Douglas, this Court found that no determination of the fairness of the plan of reorganization could be made because of the absence of requisite valuation data, and that, as a result of the absence of the valuation data, the Court was in no position to exercise the "informed, independent judgment," which appraisal of the fairness of a plan of reorganization entails.

4. The many questions of law raised by the objections to the plan of reorganization filed in the District Court present questions of great importance in determining the lawfulness of plans of reorganization of railroads under Section 77 of the Bankruptcy Act. No case of the many such cases now pending has yet been taken by this Court for final determination. Property interests in vast amounts and important questions of public interest are involved in the instant case. This Court should definitely and finally lay down the legal and equitable principles which should be applied by the Interstate Commerce Commission and the District Courts of the United States in determining and approving plans of reorganization under Section 77.

Wherefore, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review on a day certain, to be therein named, a full and complete transcript of the record and all of the proceedings in the cases numbered on its docket, Nos. 7561, 7562, and 7724, and en-

titled *In the Matter of Chicago and North Western Railway Company, Appellant* v. *Mutual Savings Bank Group Committee, etc., et al., Appellees,* (*And other appeals*), and that the judgment of the Circuit Court of Appeals for the Seventh Circuit, and the decisions of the District Court may be reversed, and that your petitioner may have such other and further relief in the premises as to this Court may seem proper.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company,
Debtor, Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Summary of argument.

I.

The findings made by the Interstate Commerce Commission are wholly insufficient to enable the Court to perform its function under Section 77 of the Interstate Commerce Act.

II.

The Court may not substitute the results of balloting by creditors for (a) the failure of the Commission to make necessary findings, and for (b) the informed, independent judgment of the Court as to whether the plan of reorganization is fair and equitable.

III.

The plan of reorganization as approved and confirmed is not fair and equitable and does not meet the tests required by the law of the land.

ARGUMENT.

A statement of the case has been presented in the petition for writs of certiorari and will therefore not be here repeated. We understand that a petition for review by this Court need not and should not take the place of a brief on the merits of all issues involved in the proceedings. It is our purpose simply and briefly to show that this Court should review the action of the Court below. It well may be that the face of the pleadings discloses sufficient for the Court to determine that, in the interest of expedition, the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the case remanded with directions to reverse the orders and the decree of the District Court, and to remand the proceedings to the Commission for further proceedings, in accordance with the law, as was done by the same Circuit Court of Appeals in the case of *In re Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 124 F. (2d) 754, decided December 4, 1941, now also the subject of a petition for writs of certiorari in Docket Nos. 875-883. The Debtor, however, desires to file a brief on the merits and to be heard at oral argument if there is to be any determination by this Court of the many important issues of law presented by these proceedings.

I.

The findings made by the Interstate Commerce Commission are wholly insufficient to enable the Court to perform its function under Section 77 of the Interstate Commerce Act.

In the opinion of the Circuit Court of Appeals in *In re Chicago, Milwaukee, St. Paul & Pacific R. R. Co., Debtor, supra,* the Court said that the fairness of any reorganization plan presents a legal question which the Court cannot and should not evade or avoid. The Court stressed the decision of this Court in *Consolidated Rock Products Company* v. *DuBois,* 312 U. S. 510, 85 L. Ed. 982, saying that the opinion in that case pointed the way and laid down the rules for the guidance of the Circuit Court of Appeals, and said of that opinion that it is quite clear it "must be our text for determining the disposition of this appeal."

The opinion of the Circuit Court of Appeals in that case listed the holdings of this Court in the *Consolidated Rock Products* case, *supra,* which it considered pertinent and included the following (124 F. (2d) 754, 762-3):

> "(a) The necessity of the application of the absolute priority principle to reorganizations of solvent and insolvent corporations;
>
> "(b) Interest accrued on bonds (not contingent interest which has not been earned) is entitled to the same priority as the principal;
>
> "(c) Future earning capacity of the enterprise is the criterion for the determination of values of assets of commercial corporations, as well as of the practicability and fairness of the plan of reorganiza-

tion, where as here, the assets are productive properties. In railroad reorganizations, values are to be determined by the rule stated in Sec. 77 (e).

* * * * *

"(j) Findings must be made on all vital issues, controverted and uncontroverted, and must include values of properties separately considered and also of Debtor's property as a whole. Findings must cover values of liens to be surrendered and values of securities given in exchange. They should specifically cover the ultimate (not evidentiary facts) facts upon which the values are based. They must show that fixed interest charges are included and show that values are based on income-producing factors."

On page 764 it said:

"In view of the reversal and remanding of this case for the making of findings, which we find it is necessary to order, we will not discuss at great length, or in great detail, the fairness of the plan with respect to these two mortgages. It is sufficient to observe that the fact situation permits of a plan such as the Commission formulated and approved. The plan as such, ignoring the absence of findings, has support in the evidence. It violates no requirements (save findings) announced in the Consolidated Rock Products case."

On page 766 the Court continued:

"This brings us to that phase of this appeal which is based upon the failure of the Commission to make the necessary findings required by the Consolidated Rock Products Company case. There is undoubted support for the argument that the Commission inferentially made findings when it allocated the new securities to the old mortgages. But the fairness of that allocation is dependent upon the findings of fact. Without such findings we cannot intelligently approve or disapprove.

"We appreciate that the findings of fact must, in the last analysis, be based upon evidence, much of which is to be found in the report of the I. C. C.

Hence it may well be argued that the I. C. C. could make such findings by taking notice of its reports and the statistical information in its files bearing upon the income of this railroad and of its various branches. Reluctant as we are to do so, we nevertheless feel that under the decision of this controlling case, there must be a return of the cause to the District Court with direction to the District Court to return it to the I. C. C. and for that body to make the findings on issues vital to the question of values and equities as announced in said Consolidated Rock Products case. *Likewise, the findings must be so specific that the court may definitely see that in the new plan, provision for full compensation of cancelled old senior securities, and all prior preferred positions, is made.* The findings must be sufficiently complete on these matters, that the court may, from its examination, ascertain whether full compensation has been made for the entire bundle of rights which each of the creditors is called upon to surrender.

"It would be begging the question to assume that findings were necessarily made by the I. C. C. when the allocation was made. We would be delegating to the I. C. C. an obligation which is ours. The Commission must formulate its plan. It must make fact findings supported by the evidence upon which its plan is based. We must independently determine whether the plan is fair and equitable. In reaching our conclusion we must ascertain (a) whether there is evidence sufficient to support the findings and (b) we must be able to say that the findings support the plan, and (c) the plan is fair and equitable." (Court's own italics.)

Specifically the Court then continued:

> "As to the necessity and character of the findings, the court in the Consolidated Rock Products case spoke and the rule it announced applied to the I. C. C. in railroad reorganizations as fully as it applies to the District Court in other reorganization cases. Save as modified by Sec. 77 (e) the Commission should follow the opinion in that case."

Yet that same Court in the instant case said in its opinion (Tr. 5813):

> "The objection we are dealing with,—a failure of the findings of the I. C. C. to be sufficiently specific,—presents a procedural question. True, in many instances, this procedural question looms large and may be of controlling importance. Nevertheless, it is not jurisdictional in character. We are satisfied that different facts and a *different law*, under which the reorganization of railroads is authorized, *distinguishes* this case from the *Consolidated Rock Products* case." (Italics ours.)

In the *Milwaukee* case the Court said as to findings, at page 766 of 124 F. (2d):

> "In the report of the Commission there is a discussion of the various factors which were deemed pertinent in its inquiry into values. Absent, however, were clear cut findings or values which are so essential to the intelligent approval of the plan. Our criticism is not directed to the fact that the findings were embodied in the Commission's report (a large part of which is devoted to a discussion and statement of the evidence) rather than stated specifically as findings. But the fault lies in the fact that we are left uncertain, or in the dark, as to the finding of the Commission. The evidence might support a finding of a larger or a smaller amount. Which should we accept? The fact finding body is the I. C. C. It must find. We cannot.
>
> "Somewhat similar was the situation in the case of *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 162, a case which arose from a three judge district court in this circuit. In the absence of specific findings the Supreme Court set aside the decree and remanded the cause to make the necessary and appropriate findings. It refused to accept the conclusions of the District Court as inferential expressions of its fact conclusions. See also *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U. S. 67; *United States* v. *Magnolia Petroleum Co.*,

276 U. S. 160, and *Universal Battery Co.* v. *U. S.*, 281 U. S. 580."

Yet in the instant case the same Court said, in discussing the classes of creditors where over 96% of those voting had approved the plan (Tr. 5808):

> "It is not a question of a necessary majority (two-third). The majority in each group, in the case before us, was far greater than the minimum requirement. It is a question of whether the report of the I. C. C., which was full and complete, fair and open, but lacking in one respect,—failure to make specific findings of values,—may, or should, be approved without said findings. In fact, the issue may be stated even more strongly against the minority. Does not the vote of approval supply the proof that the report of the Commission contained the evidence, and the Commission's finding sufficiently states the facts, to justify us in holding that separate and more detailed findings are unnecessary? We think it does."

When we view these expressions just quoted, a question arises at once as to whether the Circuit Court of Appeals reached the conclusion that the various classes of creditors were better able to appraise the report of the Interstate Commerce Commission, approving a plan of reorganization for the Chicago and North Western Railway Company, than the Court of Appeals itself in appraising the report of the Commission, in approving a plan of reorganization for the Milwaukee, where there had been no submission of the plan to creditors for vote of approval or disapproval. We quote further from the opinion of the Circuit Court of Appeals in the instant case (Tr. 5808):

> "We have no doubt that if the decision in *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510, had been announced before the findings of the I. C. C. in this case, the evidence which was before the I. C. C. would have been collected and stated in formal find-

> ings rather than in explanatory statement and fact assumptions. The story, factual and statistical, however, was all told. Its more important features were related in reports of an examiner and later, in the report of the I. C. C.* (*Both overflowing with material facts and records of volume of business, earnings, and trends.)"

In an attempt to distinguish the *Milwaukee* case from the *North Western,* the Court in the latter opinion used the following language which is directly contrary to the language in *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, saying, at Tr. 5805 (our italics):

> "This case differs from the Milwaukee case in this respect. Here, the creditors have received the plan and voted, almost unanimously, their approval of it. Our question then is not restricted to the sufficiency of findings to support the plan, but it is a review of a plan *which has the approval of the various groups of creditors.** The stockholders are eliminated. The creditors alone are entitled to the assets of the debtor. They are also entitled to a fair allocation of new securities in view of the value of their old bonds, having due regard to the value of the liened property and the future earnings of the road.
>
> "While fairness is a somewhat relative term and is not measurable, in its practical application, with mathematical certainty, courts will not go beyond the expressed assent and approval of the bondholders to ascertain whether fairness in distribution attained the goal of perfection. If the creditors who are to share an insolvent estate understandingly agree on a division thereof, the problem of the court has been solved."

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* The Court of Appeals in its opinion in the instant case nowhere finds that "the approval of the various groups of creditors" was not secured by means forbidden by law, and does not mention that of the total outstanding securities of $354,178,080, held by creditor classes authorized to vote on the plan, only $222,174,728, or 62.7 per cent of the total outstanding, voted to accept the plan. Moreover, the Insurance Group and the Savings Bank Group held 53 per cent of the total voting to accept the plan. Eight of the eighteen appeals disposed of by the Circuit Court of Appeals in its decision were from orders and decrees entered prior to the vote on acceptance of the plan.

This expression just quoted ignores the fact that the Debtor is not insolvent and there has been no finding to that effect by the Commission nor by the Court. Its petition for reorganization merely stated that it was unable to meet its debts as they matured. Also these creditors could not be said to have agreed "understandingly," when they were not advised in the balloting papers of the pending appeals. The Court did not in its opinion pass on the question of the fairness of the vote, and, if the creditors alone can control, the interest of the public is completely ignored since, as the Court says at Tr. 5811, in the North Western opinion, this is a quasi-public institution.

The opinion also ignores the fact that seven of the appeals covered by the opinion were from the order approving the plan and one was from the order denying Debtor's motion to refer the plan back to the Interstate Commerce Commission, both of which orders were entered prior to the submission to the creditors. How can the appellants lose their right to have those appeals decided as of the time the orders were entered? Shall it be said that because the Debtor could not afford a supersedeas bond and the District and Circuit Courts refused to stay the proceedings as to certification, all appellants have waived their appeals from the approval order? And is not the Circuit Court of Appeals required to decide the validity of the order refusing to send the plan back to the Commission for determination of value, as of the time of entry of the order and as to which no question of approval by creditor vote is pertinent?

Moreover, if the plan were legally unfair, inequitable or contrary to law, how could the stockholders be held to have had due process where the Court affirms solely on the ground of waiver by the creditors of necessary findings?

The stockholders (who suffered the greatest loss) had been deprived of their right to vote so that they could not be said to have waived any of their objections to lack of findings and the many other specific objections raised to the validity of the plan. It is true that the Court in the instant case affirms the lack of value in the equity, but it pointed out in the *Milwaukee* case that a finding of value of the properties of the reorganized company was essential to a determination of whether or not the plan was fair and equitable, and we maintain that it is likewise necessary to have a finding of value of Debtor's properties before there can be an intelligent determination of value or lack of value in the equity. Even in the second opinion in the *Milwaukee* case, refusing to modify its first opinion to the effect that the evidence supported the finding of the Commission as to the lack of value in the equity of the stockholders, the Court expressly said (Sheet 2 of supplementary opinion, issued January 12, 1942):

> "It follows that this branch of the case, the value of the equity of the debtor, evidenced by the common and preferred stock, is closed, and the I. C. C. need not further investigate or make further finding on this issue unless it is convinced that changed conditions in railroad earnings warrant it. In other words, the I. C. C. has jurisdiction of the matter and may, although it is not required to do so, re-examine the evidence, or receive additional evidence, if in its judgment, justice to the parties requires it."

Nowhere is there any discussion of the possibility of issuance of options or warrants to the thousands of stockholders whose rights have been completely eliminated.

On Tr. 5809, in the opinion herein, the Circuit Court of Appeals says:

> "In short, we hold, the approval of the plan differentiates this case from the Milwaukee case. It

was an equivalent of a waiver of more specific findings by all who approved the plan. It also supplied the proof that the report gave the bondholders sufficient facts to understand and appraise the worth of the plan."

Does it follow that just because one approves of something he understands it? Would not it be just as logical to say that he approves it because he does not understand it, and if he had had sufficient knowledge to appraise it, he would have disapproved it? Elsewhere (page 40 hereof) we quote an expression of the Commission that creditors "frequently are discouraged and uninformed."

The Court proceeds (Tr. 5809):

"Thus far we have considered the effect of the approval of the creditors of the plan submitted by the I. C. C. As to them, the objection that the findings of the I. C. C. are insufficient and lacked specificity, is unavailing."

On Tr. 5810 in the Court's opinion we find:

"If we are correct in our assumption that those who did not vote and those who have neither specifically objected to, nor approved of, the plan, have left it to the court to represent them, we accept the responsibility and vote their interest in favor of the plan. While the responsibility for acting both as umpire and as guardian for the many small and unknown bondholders scattered throughout the United States is a somewhat large one, we are not at liberty to decline it, nor to avoid its burden. Our approval of the plan is so whole-hearted that we have no hesitancy in the matter. All arguments seem to favor approval.

"We favor it, because:

"All the creditors of each group who have voted, are overwhelmingly in favor of it.

"Such a plan, if consummated, would terminate these lengthy proceedings. * * *"

Are these valid reasons for approving a plan and voting as guardian for all those who did not vote? Could not these two reasons exist just as well with a most unfair, inequitable and illegal plan if the creditors in their discouragement and ignorance had approved it?

Further (Tr. 5810-11), the Court says:

> "Numerous plans have been submitted, none of which meets with as much satisfaction as the one before us. The present plan can not be compared with perfection, for perfection would provide for payment of one hundred per cent cash to each bondholder. Also, the stockholders would be given dividend bearing stock. Unfortunately, the revenue of the Debtor makes it necessary to face realities, not act on unfounded hopes, or dwell in air castles."

Finally, on the question of waiver, the Court says (Tr. 5812-13):

> "Had the necessary percentage of bondholders not voted for the plan, or the District Court had not made favorable findings in the case of a single group whose bondholders had failed to give a two-thirds majority in favor of the plan, we would have been confronted by an insurmountable jurisdictional objection. Such, however, is not the situation. The objection we are dealing with,—a failure of the findings of the I. C. C. to be sufficiently specific,—presents a procedural question."

Yet upon that single "procedural question" the same Circuit Court of Appeals reversed the order of approval of the Milwaukee plan. Certainly the Milwaukee opinion would lead one to suppose the Court considered the objection to be one going to jurisdiction, rather than being "procedural."

There is no real difference between the *Milwaukee* case and the instant case of the North Western with reference to lack of findings by the Commission as to values. The

same absence of requisite findings to enable the Court to determine whether the plan of reorganization is fair and equitable, which compelled the Court of Appeals to send the *Milwaukee* case back to the Commission, exists in this case, and the Court of Appeals should have sent these proceedings back to the Commission to determine and certify values of the Chicago and North Western Railway Company, the Debtor herein.

II.

The Court may not substitute the results of balloting by creditors for (a) the failure of the Commission to make necessary findings, and for (b) the informed, independent judgment of the Court as to whether the plan of reorganization is fair and equitable.

We have at perhaps undue length contrasted the opinions of the Circuit Court of Appeals in the *Milwaukee* case and in the instant case; the only differentiation, as the Court points out quite frankly, is the approval of the plan by the creditors.

In the petition for writs of certiorari, we have set forth a quotation from the opinion of this Court by Mr. Justice Douglas in the *Los Angeles Lumber Products* case, *supra*, where it is specifically held that the Court must exercise its independent judgment as to whether a plan of reorganization is fair and equitable as a matter of law. The Court is not merely a ministerial register of votes of several classes of security holders. The approval by the classes of creditors voting on the plan of reorganization in the instant case upon which the Circuit Court of Appeals relies so completely was not "overwhelming." Only 62.7 per cent of the security holders authorized to vote on the plan voted to accept it, and of those voting to accept the plan, the Insurance Group and the Savings Bank Group constituted 53 per cent.

Prior to the amendment of Section 77 on August 28, 1935, the law required acceptances by two-thirds of each class of creditors. Counsel and officers representing various life insurance companies, who are parties to these proceedings, appeared before the Committee on the Judiciary, House of Representatives, 74th Congress, 1st Session, in April, 1935, and urged an amendment to Section 77 as it then stood, so as to provide that acceptance of a plan of reorganization necessary to bind the minority of a particular class should be changed from an affirmative vote of two-thirds of the total outstanding securities of a particular class to an affirmative vote of two-thirds of those who vote. (Page 75 of the hearings)

The representatives of these life insurance companies at that time informed the Judiciary Committee that life insurance companies of the country as a whole hold $3,000,000,000 of railroad bonds, out of the $12,000,000,000 outstanding; the sixteen life insurance companies represented by counsel at that hearing held $2,000,000,000 of such bonds. Likewise counsel for mutual savings banks of the United States, many of whom are parties to these proceedings, appeared in support of the same amendment, stating that the investments of mutual banks in railroad bonds range between $1,600,000,000 and $1,700,000,000. (Pages 101-102 of the hearings)

As a result of these hearings, Section 77 was amended August 27, 1935, so as to provide that acceptance would bind the minority where two-thirds of those voting in each creditor class accepted the plan of reorganization. While the Life Insurance Group and Savings Bank Group, parties to these proceedings, hold only 33.2 per cent of the outstanding securities of the Debtor, they were able to cast 53 per cent of the votes of acceptance of the plan in the aggregate. There has been no finding of insolvency of

the Debtor and it is unthinkable that acceptances under the circumstances shown by this record should operate as a finding that the plan of reorganization is fair and equitable.

In the table opposite this page are shown the holdings of these creditor groups of Debtor's securities and the ratio of those holdings to the outstanding securities and to the securities voting on the submission by the Commission.

Creditor Class	Total outstanding (Note a)	Total voting to accept plan (Note a)	Total held by insurance group (Note b) and savings bank group (Note c)	Percentage holdings of insurance group and savings bank group to total outstanding	Percentage of holdings of insurance group and savings bank group to total vote to accept plan
5. Preferred claims	$ 25,823	$ 25,823	$		
6. General mortgage bonds, 1987	132,019,000	96,654,500	69,260,000	52.5	71.7
7. Sioux City & Pacific R. R. bonds	4,000,000	3,464,000	2,713,000	67.8	78.3
8. Milwaukee & State Line bonds	2,500,000	1,083,000	1,003,000	40.1	92.6
9. Manitowoc, Green Bay & North Western bonds	3,750,000	3,169,000	2,526,000	67.4	79.7
10. St. Paul Eastern bonds	1,120,000	667,000	645,000	57.6	96.7
11. Milwaukee, Sparta & North Western bonds	15,000,000	9,626,000	7,862,000	52.4	81.7
12. Des Plaines Valley bonds	2,500,000	1,847,000	1,353,000	54.1	73.3
13. St. Louis, Peoria & North Western bonds	10,000,000	7,191,000	5,452,000	54.5	75.8
14. 1st and refunding bonds, 2037	47,822,000	24,090,000	14,994,000	31.4	62.2
15. 15-year 6½% bonds	14,775,000	8,505,000	5,168,000	35.	60.8
16. Convertible 4¾% bonds	72,335,000	18,602,000	6,710,000	9.3	36.1
18. Collateral promissory notes	42,313,882	47,049,192			
21. General claims	1,017,375	201,213			
	$354,178,080	$222,174,728	$117,686,000	33.2	53.

(a) Taken from Commission's certificate of May 13, 1941.

(b) Insurance group holdings, printed record in District Court pages 624-5. (Tr. 291)

(c) Savings bank group holdings, printed record in District Court pages 3722-3. (Eliminated from printing by stipulation approved by this Court, Tr. 5201)

At the hearing before the House Judiciary Committee on April 15, 1935, on H. R. 6249, proposing to amend Section 77, 74th Congress, 1st Session, Joseph B. Eastman, Federal Coordinator of Transportation, appeared in support of that bill and presented a statement embodying the recommendations of the Interstate Commerce Commission, which is attached as an appendix to his statement, where it is stated, at page 22 of said hearings:

> "One cause of dissatisfaction with the equity procedure has been the absence of a real adjudication, owing to the inclination of the courts to confirm reorganization plans in circumstances where the confirmation was frequently based upon no real scrutiny of the plan or determination of the justice of the settlement of the important issues involved. *The votes of creditors and stockholders, who frequently are discouraged and uninformed, are not evidence of the fairness or justness of a reorganization plan, whereby minorities are bound.* Such minorities cannot complain of the substitution of a complete adjudication by the Commission and the court of the rights of the parties." (Our italics.)

We call attention to this opinion of the Commission as indicating that the fairness and justness of a plan is to be determined by the Court independent of and unaffected by the votes of creditors, as the latter affords no basis for, and may not be substituted for, an informed independent judgment of the Court that the plan is fair and equitable.

It cannot be doubted that the decision of the Circuit Court of Appeals in the instant case was based upon the fact that the necessary majority of creditors of each group which voted, favored the plan. This Court said in so many words that to hold a plan is fair and equitable because the requisite percentage of the class of security holders had approved it, made "the judicial determination on the issues of fairness a mere formality and would

effectively destroy the function and the duty imposed by the Congress on the District Courts." *Case* v. *Los Angeles Lumber Products Co., supra.*

The ballot box of creditors receiving a property under a plan of reorganization may not be substituted for the independent judgment of the court. This Court may well dispose of the petition for writs of certiorari in this case by simply reversing the decision of the Circuit Court of Appeals herein, on the authority of the case cited, with directions to remand for further necessary findings as required by the decision of the Circuit Court of Appeals in the *Milwaukee* case.

III.

The plan of reorganization as approved and confirmed is not fair and equitable and does not meet the tests required by the law of the land.

On June 8, 1940, Debtor filed its objections to the plan of reorganization as approved and certified by the Interstate Commerce Commission to the District Court. (Tr. 4000)

The opinion of the Circuit Court of Appeals deals specifically only with those objections filed by the Debtor which relate to the treatment of the Reconstruction Finance Corporation and the value of the equities of the Debtor's stockholders, and the objection of the Irving Trust Company, trustee of the State Line bond issue, saying as to all other objections (Tr. 5816):

> "We have considered other objections which we deem it unnecessary to discuss separately. They are all overruled."

All of Debtor's objections to the plan were overruled by the District Court and on appeal to the Circuit Court of Appeals were insisted upon, both on brief and in oral argument. All of the objections are regarded as meritorious and worthy of serious consideration and determination by this Court. The limits of this brief in support of the petition for writs of certiorari do not permit of detailed argument. Therefore, we content ourselves for the time being with a statement of the substance of those objections.

1. The maximum limit of capitalization of the reorganized company of $449,974,309 is entirely inadequate.

2. There is a value in the equities of the preferred and common stock.

3. Holders of convertible bonds of 1949 are entitled to an allocation of securities of the new company for the full amount of their claim.

4. The rate of interest on new Sioux City & Pacific Railroad bonds should not exceed 3½ per cent, the present rate of interest.

5. The rate of interest on new Des Plaines Valley bonds should not exceed 3 per cent.

6. The treatment accorded to the claim of Reconstruction Finance Corporation is unfair and inequitable to other creditors and to the stockholders.

7. The plan of reorganization should not allot securities for full interest on the claim of Reconstruction Finance Corporation and, as well, the full amount of interest on collateral held to secure said claim.

8. The plan should be modified so as to provide for the claim of Reconstruction Finance Corporation, either by issuing notes for the full amount of the claim with interest thereon at 4% as of the effective date of the

plan, or by issuing new securities for a portion of the claim, the balance to be represented by serial notes.

9. The provisions of the plan as to creation of a finance committee and delegation of authority thereto are unlawful.

10. The provisions in the plan for a voting trust are contrary to law, equity, and public interest.

11. Reorganization managers should be appointed by the Court and be under full control thereof.

12. The plan of reorganization should be modified so as to provide for the use of $13,100,000 bonds and a like amount of common stock for general corporate purposes, as the rehabilitation program which contemplated use of such securities has been otherwise provided for.

13. The Commission's forecast of earnings available for fixed charges is wholly unfounded and unacceptable as a basis for the capitalization of the reorganized company.

14. The plan of reorganization should have taken into consideration prospective earnings resulting from increased divisions of joint rates, reduced mileage rates on refrigerator cars, and operating economies aggregating not less than $3,840,000 annually.

15. To the extent that common stock reserved for general creditors is not required for that purpose, such reserved capital stock should be available for debenture holders.

16. A plan of reorganization should make provision for continuance of Debtor's pension system. (This objection was sustained by the District Court.)

17. In the absence of a determination and certification of value by the Commission in accordance with the

requirements of Section 77 (e), the findings of the Commission as to value under Section 19a of the Interstate Commerce Act are *prima facie* evidence of the value of the property of the Debtor, Chicago and North Western Railway Company.

18. The Commission should have considered the economies which might result from the consolidation of the properties of Debtor and of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, also in reorganization under Section 77, and if there are found to exist such possible economies, the plan of reorganization should have provided for such consolidation.

In addition to the specific objections above set forth, Debtor assigned additional errors which may be substantially stated as follows:

(a) No interest on claims after the date upon which petition for reorganization was filed in the District Court may be included in the capitalization.

(b) The effective date of the plan of reorganization should be July 1, 1935, the nearest convenient date to the date of filing of the petition.

(c) The decree confirming the plan of reorganization is void because (1) the Commission failed to advise creditors entitled to vote upon the plan of reorganization that appeals had been taken from the order of the District Court approving the plan, and (2) approval by the creditors of the plan of reorganization was not secured by lawful means.

(d) Creditors holding securities of more than one class may not vote all their securities in each class but must elect as to which class will be voted.

(e) The plan of reorganization is not feasible in that it fails to make reasonable provision for liability of the reorganized Debtor for Federal taxes.

In an appendix to this brief, we set forth a comparison of certain data of the Milwaukee and of the North Western, the authority for the data being shown in the appendix. The difference in treatment of the two properties in their respective plans of reorganization is striking. It will be noted, as of December 31, 1938, the total capitalization of the Milwaukee exceeded its rate-making value by $16,000,000, while the North Western's capitalization was $220,000,000 less than its rate-making value. Under the plans of reorganization as of January 1, 1939, the debts of the reorganized companies are practically the same; yet the fixed charges of the Milwaukee are approximately $900,000 greater than the fixed charges of the North Western.

The authorized preferred stock of the two reorganized companies is practically the same but the authorized common stock of the Milwaukee is approximately $95,000,000 greater than the common stock of the North Western. The reorganized Milwaukee has an authorized debt of 40.8 per cent of the total capitalization, while in the case of the North Western, the debt is 49.4 per cent of the total capitalization. Had the plan of reorganization of the North Western provided that the debt of $222,000,000 bear the same ratio to total capitalization as in the case of the Milwaukee the total capital stock of the reorganized Debtor would have been $322,000,000, an increase of $96,000,000. A comparison of the earning capacity of the two companies is shown on page 2 of the appendix to the brief, which shows the income for the year ending December 31, 1941, available for fixed charges, before income taxes.

There is also shown the application of the earnings of the two companies under certain assumptions as to tax liability, from which it clearly appears that the matter of income taxes and excess profits taxes is of the utmost

importance in determining the feasibility of the plan of reorganization. The Commission gave no consideration whatever to the effect of the plan on the liability of the reorganized Debtor for these taxes. District Judge Hincks, in his opinion on the plan of reorganization *In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor,* dated December 8, 1941, unreported, said: "Nevertheless in these days when tax problems loom large I think the Judge, before approving a plan, should have affirmative assurance that its feasibility is not jeopardized by liability for taxes which may accrue upon its consummation."

A computation made by the general auditor of Debtor's Trustee as to probable taxes of the reorganized company, based on the actual earning results for the year 1941, was filed in the Circuit Court of Appeals. It showed that the reorganized company, if the plan becomes effective as of January 1, 1939, would be compelled to pay a normal income tax of $2,498,436 and an excess profits tax of $5,584,567, a total of $8,083,000, on the basis of interpretations of the tax laws by the Commissioner of Internal Revenue. None of this tax would be due if the debtor company with its present security holders was the taxpayer. The proceedings should be remanded to the Commission for further consideration of the tax problem, as the present plan of reorganization is no longer feasible when considered under present tax laws.

CONCLUSION.

While these proceedings have consumed a period of almost seven years, there is no overwhelming requirement that there be an immediate termination of all efforts to obtain a fair and equitable plan of reorganization. During that period the trustees operating Debtor's properties have been able to pay all operating expenses and to maintain the property in superb condition without recourse to loans from any source. The statement in the opinion of the Circuit Court of Appeals, on page 5814, that "The Debtor has been solely dependent for the continuance of its operation, on aid from the R. F. C.," is not true; on December 31, 1941, as appears from the statement of the Trustee filed with the Circuit Court of Appeals, and constituting part of the record herein, there was cash on hand of $31,635,419.30. During 1941 the Trustee has paid the interest on claims of the creditors in accordance with the plan of reorganization for the calendar years 1939 and 1940 in excess of $9,000,000. (Tr. 5359, 5601-07)

It is, of course, highly desirable that these proceedings be terminated as early as is possible. Speed in determination must not be allowed to sacrifice the interests of justice. The proceedings should be terminated only after all important issues have been determined by this Court. For an intelligent determination as to whether the plan of reorganization is fair and equitable, findings by the Commission as to valuation of Debtor's properties, in accordance with the provisions of the last paragraph of Section 77 (e), are necessary.

No plan of reorganization under present Section 77 has been scrutinized by this Court. The laborious undertaking by all the parties to these various proceedings preliminary

to the determination by this Court of the questions of law involved under Section 77 have about been concluded, and the Court should, after the requisite valuation data has been made a matter of record, as required by law, lay down principles of law and rules of procedure which will be binding in all Section 77 proceedings.

We believe that the issues involved in these proceedings are so important that they should be considered and determined by this Court. These proceedings present an opportunity to make fully effective the purposes of the Congress in enacting Section 77.

Respectfully submitted,

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Debtor, Petitioner.

APPENDIX.

COMPARISON OF TREATMENT OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD AND CHICAGO AND NORTH WESTERN RAILWAY.

	Milwaukee As of Dec. 31, 1938	North Western As of Dec. 31, 1938
OLD COMPANY		
Total Capitalization		
Debt	$508,047,413(4)	$371,381,465(5)
Stock		
Preferred	119,307,300(4)	22,395,000(5)
Common (no par, shown at $100 per share)	117,406,000(1)(4)	158,440,220(5)
	$744,760,713	$552,216,685
Fixed Interest Charges	23,739,279(9)	16,689,097(8)
Rate-making Value	$728,446,507(2)	$676,793,588(3)
REORGANIZED COMPANY (under I. C. C. plan)		
Total Capitalization	As of Jan. 1, 1939	As of Jan. 1, 1939
Debt	$224,037,950(4)	$222,078,460(6)
Stock		
Preferred	108,675,971(4)	106,996,076(6)
Common (no par, shown at $100 per share)	215,819,400(4)	120,899,773(6)
	$548,533,321(4)	$449,974,309(6)
Fixed Interest Charges	4,269,654(4)	3,382,079(6)
Normal Future Year Earnings	No finding by I.C.C.	$14,625,000(7)
Per Cent of Debt to Total Capitalization	40.8(4)	49.4

PRESENT COMPANY	Milwaukee	North Western
Income available for fixed charges (before income taxes) for year ending December 31, 1941	28,939,719	21,833,939
Disposition of available income by present debtor corporation	23,408,386	16,332,923
Balance for dividends on stock	5,531,333	5,501,016
Dividends on preferred stock @ 5%, and of North Western @ 7%	5,965,365	1,567,650
Available for common stock	(def) 434,032	3,933,366
REORGANIZED COMPANY—With no change in tax basis		
Income available for fixed charges (before income taxes)	28,939,712	21,833,939
Normal income tax	5,086,227	2,138,237
Available income after income and excess profits taxes	23,853,485	19,695,702
DISPOSITION OF AVAILABLE INCOME (after income and excess profits taxes)	12,532,528	13,000,229
Net available for stock	11,320,957	6,695,473
Dividends on preferred stock—5%	5,433,798	5,349,804
Balance available for dividends on common stock	5,887,159	1,345,669

NOTE: Data shown as to earnings of Debtor, Chicago and North Western, for the year 1941 and disposition of such income is shown in statement filed with the United States Circuit Court of Appeals on February 4, 1942, over the certificate of A. R. Seder, General Auditor, of Debtor's Accounting Department. Data as to the earnings of the Milwaukee for 1941 was furnished by the comptroller of the Milwaukee and is not a matter of record in the Milwaukee proceedings, there is, however, of record a monthly statement of the results of operation in that record for the various months January to November, 1941, inclusive. Counsel for Debtor has made the computations as to disposition of income of the Milwaukee shown in the above table and believes them to be correct.

(1) Not including Terre Haute capital stock.

(2) As at June 30, 1935, taking I. C. C. values found in 1915, 1916, and 1918, of $621,338,759 and adding additions and betterments adjusted for depreciation at stated rates. This is the combined common-carrier properties, including Terre Haute. See Appendix to Report of Commission.

(3) As at December 31, 1935.

(4) Source: Appendix to Report of Commission.

(5) Tr. 3677 (6) Tr. 3676

(7) Tr. 3518; $3,220,271 of which would be derived from extensive improvement of facilities and operating methods.

(8) Interest requirements of securities in hands of public as of January 1, 1939, are $16,546,819. (Tr. 3521-4)

(9) Report of Commission: Record in this Court on Milwaukee petition for writs of certiorari, Docket Nos. 875-883.—Tr. 2174.

(3)

U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

34-38, 56-57, 62-64, 68-983-4

Nos. ~~999-1003, 1072-3, 1087-9, 1121-2, 1190-1.~~

IN THE MATTER OF THE REORGANIZATION OF THE
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

DEBTOR.

BRIEF OF LIFE INSURANCE GROUP COMMITTEE AND MUTUAL SAVINGS BANK GROUP COMMITTEE IN OPPOSITION TO PETITIONS FOR CERTIORARI.

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IN THE MATTER OF THE REORGANIZATION OF THE

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

DEBTOR.

BRIEF OF RESPONDENTS, LIFE INSURANCE GROUP AND MUTUAL SAVINGS BANK GROUP, IN OPPOSITION TO PETITIONS FOR CERTIORARI.

Foreword.

This brief is filed on behalf of the Life Insurance Group Committee, consisting of eleven life insurance companies,[1]

[1] The member companies of the Life Insurance Group are the following:

Aetna Life Insurance Company
John Hancock Mutual Life Insurance Company
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
New England Mutual Life Insurance Company
New York Life Insurance Company
The Connecticut Mutual Life Insurance Company
The Mutual Benefit Life Insurance Company
The Northwestern Mutual Life Insurance Company
The Prudential Insurance Company of America
The Travelers Insurance Company.

and the Mutual Savings Bank Group Committee, consisting of two hundred and fifty savings banks,[1] in opposition to the petitions for certiorari. These interests own securities of the debtor, Chicago and North Western Railway Company, in the principal amount of more than one hundred million dollars.

The Interstate Commerce Commission's plan of reorganization for this large railroad property, which has now been approved and confirmed by the district court and the circuit court of appeals, and overwhelmingly accepted by the creditor interests, is the product of seven years of most intensive and earnest effort. The exacting statutory process set up to safeguard public and private rights in the enterprise has finally run its course.[2] If this Court permits, reorganization may now be effected. It may be effected, not through the medium of negotiation and bargaining, but on the basis of a plan which the agency selected by Congress has found to "be compatible with the public interest". (Section 77(d)) The plan represents an administrative determination of factual issues by the

[1] The savings banks which comprise this Group are represented by a committee consisting of the following institutions:

Bowery Savings Bank, New York
Central Savings Bank, New York
Dry Dock Savings Institution, New York
Emigrant Industrial Savings Bank, New York
Greenwich Savings Bank, New York
Howard Savings Institution, Newark, New Jersey
Meriden Savings Bank, Meriden, Connecticut
New Bedford Institution for Savings, New Bedford, Massachusetts
Norwich Savings Society, Norwich, Connecticut
Provident Institution for Savings, Boston, Massachusetts
Savings Banks Trust Company, New York
Springfield Institution for Savings, Springfield, Massachusetts
Suffolk Savings Bank, Boston, Massachusetts
Western Savings Fund Society, Philadelphia, Pennsylvania.

[2] A brief chronology of the proceeding is submitted in an appendix.

Commission and has been the subject of a most extensive judicial review. Every issue which ingenuity could contrive to defeat the plan has been fully weighed, twice by the district court and finally by the circuit court of appeals. The plan has been approved and confirmed by both courts, and overwhelmingly accepted by the creditors in the manner prescribed by law.[1]

The development of the Commission's plan involved three major steps, (1) a determination of the earning value of the properties for the prospective normal year, (2) a determination of the permissible capitalization and capital structure of the reorganized company, and (3) the allocation of securities to the debtor's mortgage bondholders. In the taking of those steps, the Commission stated fully and clearly the reasons for its conclusions.

The conclusion as to earning value, expressed in the amount available for fixed charges in the prospective normal year, was based upon (1) the prospective normal

[1] On January 22, 1941, the Commission submitted the approved plan to the creditors for acceptance or rejection, in accordance with the direction of Section 77(e). By order of May 13, 1941, the Commission certified the results of the submission to the district court as follows (R. 5314-5326):

Creditor Class	Total Outstanding	Percentage votes accepting plan are of total votes cast
Preferred claims	$ 25,823	100.
General mortgage bonds	132,019,000	96.06
Sioux City & Pacific R. R. bonds	4,000,000	100.
Milwaukee & State Line bonds	2,500,000	50.37
Manitowoc, Green Bay & Northwestern bonds	3,750,000	100.
St. Paul Eastern bonds	1,120,000	83.79
Milwaukee, Sparta & Northwestern bonds	15,000,000	98.28
Des Plaines Valley bonds	2,500,000	98.66
St. Louis, Peoria & Northwestern bonds	10,000,000	99.56
1st and refunding bonds	47,822,000	97.75
15-year 6½% bonds	14,775,000	98.43
Convertible 4¾% bonds	72,335,000	87.10
Collateral promissory notes	47,313,882	100.
General claims	1,017,375	98.66
Total	$354,178,080	96.2

freight tonnage[1] (R. 3512-3), (2) the average haul for the normal year (R. 3514), (3) the applicable ton-mile rate (R. 3514), (4) the total freight revenues (R. 3515), (5) passenger revenues (R. 3515), (6) other revenues (R. 3515), (7) total operating revenues for a normal future year (R. 3515), (8) operating expenses (R. 3515-6), and (9) net railway operating income (R. 3516-7).[2] The consideration of those factors led the Commission to the following conclusion:

> "Our plan of reorganization should be based accordingly on a normal expectancy of income available for fixed charges produced by the two properties of not to exceed $14,625,000 * * *." (R. 3518)

Determination of the permissible capitalization and

[1] Searching studies were made respecting the prospective movement of each class of traffic. The nature and scope of the investigation may be illustrated by the survey made of the past and prospective movement of agricultural commodities by this road, and by competing agencies of transportation, such as trucks and waterways. (R. 2104-2109; Com. Exs. 369, 370) Field studies were carried on throughout the entire territory served to obtain the opinions of state agricultural officers, rural traffic officers and station agents of the debtor and other railroads. A detailed questionnaire was submitted to the agricultural agent in each county through which the road operates and the returns collated and analyzed. Full use was made of the facilities of all of the agricultural colleges in the territory. (R. 2124-2134) Agricultural policies were studied as to their probable bearing upon the production and export of agricultural commodities. (R. 2095-2096) Similar painstaking investigations were made in respect to all of the principal commodities transported. (Com. Exs. 380, 382, 384, 385 and 391)

[2] In making these findings, the Commission had before it the underlying studies prepared by the staff of the Trustee in Bankruptcy under the direction of the responsible department heads of the railroad aided by a large staff of assistants who labored for many months. (R. 2094 ff.) Among other things these comprehensive studies dealt with the volume, consist and trend of traffic and earnings during the preceding twelve years, production trends and conditions, competitive factors and impairment in earning power. (R. 2095-2134) Four estimates based on these studies were presented to the Commission and fully considered by it in reaching its conclusions as to each item. (R. 3512-8)

capital structure involved (1) a detailed study of the corporate and financial structure of the debtor company, including a determination of the property subject to each of the debtor's mortgages as a first lien, the original cost thereof, and the cost of reproduction less depreciation (R. 3518-27), (2) a careful consideration of the plan filed by the debtor (R. 3527-37), (3) a careful consideration of the plan filed by the Group Committees (R. 3537-59), (4) the position taken by parties other than the debtor and the Group Committees (R. 3560-4), and (5) the past earnings as shown by the debtor's books of accounts (R. 3567-9). A consideration of those factors led to the following conclusion:

> "Taking into account the reproduction value of the property and the favorable past earnings, as well as the unfavorable recent and prospective earnings, it would appear that the total capitalization at reorganization proposed by the group committees, $449,505,000 is approximately the amount that should be approved." (R. 3568)

The total capitalization was divided by the Commission into fixed interest debt, contingent interest debt, preferred and common stock, on the basis of the past and prospective earnings of the road. A portion of the interest on the fixed interest debt was made contingent and commutable so that the full interest rate of 4 per cent thereon would not become effective until after operating economies had been brought about through a proposed rehabilitation and improvement program. (R. 3568-9) As to the permissible capitalization and its division into classes of securities, the Commission finally concluded:

> "From a consideration of the entire record, including the elements of value referred to, the earnings and prospective earnings, and especially the impairment in earning power of the properties, we conclude and find that the capitalization and fixed and contingent charges of the reorganized Chicago & North Western Railway Company, immediately upon reorganiza-

tion, including the bonds and stock proposed by the group committees for a rehabilitation and improvement program, it being assumed that bonds to finance this program can be sold at a 4 per cent interest rate, should be approximately as follows, no-par-value common stock being included in the total at $100 a share:

Fixed-interest debt	$117,000,000
Contingent-interest debt	105,000,000
Preferred stock	107,000,000
Common stock	121,000,000
Total Capitalization	$450,000.000"

(R. 3569)

In the allocation of securities, the Commission first deducted from the permissible fixed interest debt of $117,000,000, the amount of equipment obligations which were "so well secured that they should be assumed as unaltered as to terms in reorganization" (R. 3570), the amount of the PWA and RCC claims which it found to be fully secured (R. 3570), and the part, $25,000,000, of the RFC claim which a designated portion of the security therefor would "fairly support." (R. 3571) That left a balance of $62,243,000 of new fixed interest securities for distribution. (R. 3571) In making the distribution thereof the Commission had before it "extensive studies along three lines of approach, namely, segregation of earnings, severance value, and contributive income value." (R. 3571) The Group Committees, in their proposed plan of reorganization, had applied those studies to the average depression year, 1931-35, in the allocation of approximately $65,000,000 of fixed interest bonds. The Commission found that the allocation "correctly reflects the relative earning power, expressed in terms of contribution to the debtor's income available for fixed charges, of the several mortgage lines under depression conditions * * *" (R. 3572), and concluded:

"The allocation may thus properly serve as the basis

> of the distribution of the $62,243,000 of new fixed-interest securities proposed herein for distribution to holders of outstanding bonds and to the Reconstruction Finance Corporation as pledgee. Similarly the allocation of bonds to be pledged with the banks and the Railroad Credit Corporation may be made on the same ratios. In making such distribution on this basis, the holders of the first lien bonds on the Sioux City & Pacific and Des Plaines lines must be assigned new bonds for 100 per cent of their claims, before any assignment is made to holders of first and refunding mortgage bonds in recognition of their second lien on these properties." (R. 3572-3)

In the allocation of income bonds, preferred and common stock, the income studies were also used. On the basis of the studies and the earnings of the normal prospective year, the Group Committees had allocated such securities in their proposed plan of reorganization. With respect to that allocation, the Commission found:

> "This allocation, taken with the allocation of fixed-interest securities already mentioned, will, with adjustments, correctly reflect the relative earning power of the several mortgage lines under the conditions of the normal prospective year, and the relative value of other claims as compared with those secured by mortgage" (R. 3575),

and concluded:

> "The allocation may thus properly serve as the basis of the distribution of the income bonds, preferred stock, and common stock proposed herein." (R. 3575)

In fixing the new capitalization the Commission took "into account the reproduction value of the property and the favorable past earnings, as well as the unfavorable recent and prospective earnings" (R. 3568), so as to avoid the elimination of any interests which could reasonably be permitted to participate in the reorganized company. Nevertheless, it found that "The permissible capitalization is thus insufficient to provide for satisfaction of all credi-

tors' claims in full." (R. 3578) Indeed, the Commission found it necessary to cancel more than $41,000,000 of the claim of the Convertible Bondholders and other unsecured debt, with the balance being recognized only in common stock, and to eliminate the old stockholders entirely. (R. 3578, 3677)

If the reorganization of this property may now proceed to a conclusion on the basis of the plan formulated by the Commission, confirmed by the courts and accepted by the creditors, more than seven years will have been consumed in the bankruptcy proceeding. The many reasons which exist for avoiding an extension of that period would give way to the necessity of correcting any substantial failure to satisfy the statutory process, but we submit that none exists and that the petitions make no such showing of probable error as to warrant the granting of certiorari.

This Court has stressed the legislative intent that railroad reorganizations under Section 77 be consummated with all practicable speed,[1] and in view of that pressing consideration, we respectfully ask that the Court examine the Commission's report as a basis for the ruling upon the petitions for certiorari. It will be seen, we believe, that never before in the history of railroad bankruptcies has it been possible to accomplish the reorganization of a major railroad upon the basis of a factual investigation so complete and a determination of every issue so painstaking and so sound in its protection of both public interest and private rights.

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[1] In *Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648, the Court said:

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted." (p. 685)

I.

A REVIEW OF THE DECISION BELOW IS NOT WARRANTED ON THE GROUND THAT IT IS IN CONFLICT WITH THOSE IN THE MILWAUKEE OR WESTERN PACIFIC REORGANIZATION PROCEEDINGS.

Petitioners ask certiorari on the ground, among others, that the decision below is in conflict with that of the same court in the *Milwaukee* proceeding, and with the decision of the ninth circuit in the *Western Pacific* case.[1] Our position is that the decision below is so clearly right that no question of substance can be raised in respect to it, and that certiorari should be denied for that reason.

The subject divides naturally into two parts: (A) the position of the equity and (B) the allocation of securities to creditors.

A. The Holding That the Stock Interests Are Without Value.

There is no conflict of any character or in any degree between the decisions in this proceeding and in the *Milwaukee* case, respecting the equity interests in the respective properties.

Here, as in the *Milwaukee* case, the court of appeals specifically sustained the ruling of the district court affirming the Commission's finding that the stock interest is without value. The following quotations from the two opinions demonstrate the absence of any conflict as to this issue:

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[1] *In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 124 F. (2d) 754 (C. C. A. 7, December 4, 1941); *In the Matter of Western Pacific Railroad Company*, 124 F. (2d) 136 (C. C. A. 9, November 28, 1941).

MILWAUKEE.

"We are well satisfied that the evidence supports the finding of the Commission approved by the District Court 'that the equity of the holders of the debtor's preferred stock and its common stock has no value'."

"Now, to make our position entirely clear, we add this memorandum and hold that the finding of the I. C. C. as to absence of value of old common and preferred stock, is specific, definite and certain, and fully meets the rule which requires finding on values of assets.

"Second, we meant to hold, and do hold, that the evidence supports this finding, that there is no value to either the common or preferred stock of debtor." (R. 2311, 2335, in Nos. 875-83)

NORTH WESTERN.

"In as much as the outstanding obligations exceed $450,000,000, it follows that there is no equity for the holders of the old stock. Unless the $450,000,000 figure can be raised, the common and preferred stockholders must be eliminated. * * * It [the new capitalization of $450,000,000 as found by the Commission] meets our approval, not only because it is supported by evidence and is the finding of the I. C. C., but our independent study of the reports convinces us that a larger sum could not be sustained by the company's future business. * * * The finding which determined the absence of value in the common and preferred stock must be, and is, approved as fair to the creditors, to the stockholders, and to the public." (R. 5799, 5802, 5805)

It will be seen that the court of appeals not only held the findings of the Commission on this issue to be adequate in form, but, on the basis of the court's own independent study of the record it held that the evidence proved the stock interests in each of the properties to be without value and thus required their exclusion.

In the *Western Pacific* case, on objections of the stock interests, the court of appeals held that "it was necessary to determine the value of the debtor's property". It did not enter upon any discussion of the adequacy in substance or form of the extensive findings actually made by the Commission, and it gave no consideration to the evidence. Unlike the seventh circuit, the court made no effort to test the fairness of the plan by looking at the evidence to see whether it fully supported, or perhaps compelled, the conclusion reached by the Commission. Whether it was the court's duty to do so and thus utilize every re-

course at hand in an effort to appraise the fairness of the plan, and by doing so to effectuate the purposes of Section 77, we need not discuss. The decisive point here, we believe, is that in this proceeding, as in the *Milwaukee* case, the court of appeals went to the record and found that it required the exclusion of the stock interest and would in fairness permit no other result. In view of these very different circumstances we submit that the different result reached in the *Western Pacific* case does not create the conflict which petitioners seek to establish as a basis for granting certiorari.

B. The Allocation of Securities Among Creditors.

In the *Western Pacific* case, as we have pointed out, the court of appeals did not go to the record in an effort to make any independent determination of the fairness of the Commission's treatment of the stock interests, as did the court of appeals here and in the *Milwaukee* proceeding. Similarly, in the *Western Pacific* case the court did not undertake the burden of determining whether the evidence supported the provisions of the plan governing the allocation of securities to creditors. But in the case at bar each of the courts below made its own examination of the record, and on that basis, approved the Commission's allocation to creditors as fair and equitable. On these facts we submit that here also the asserted conflict in respect to the two decisions does not exist.

In the *Milwaukee* case, however, the court found, as it did in this proceeding, that the evidence supported the Commission's allocation of securities among creditors. It held that "The plan as such, ignoring the absence of findings, has support in the evidence." (R. 2312 in Nos. 875-83) Nevertheless the court "reluctantly" remanded the proceeding to the Commission for more specific findings. But only seven weeks later, following the filing of the petitions

for certiorari seeking review of that decision, and after full argument in the case at bar, the same court sustained the district court's approval of the plan, notwithstanding its view that the Commission's findings, like those in the Milwaukee report, were not "sufficiently specific." (R. 5813) In thus approving the plan the court refused to give dominant weight to form as it had in its decision in the *Milwaukee* case.

In its report here the Commission declared that its allocation of new securities among the debtor's bondholders "*correctly reflects the relative earning power of the several mortgage lines*" (R. 3572-3575), on the basis of "extensive studies along three lines of approach, namely, segregation of earnings, severance value and contributive income value." (R. 3571) The report contains a detailed exposition of the formulae and methods employed in determining, on the basis of the relative earnings values of the several mortgage divisions, the proper distribution to creditors, together with a disclosure of all factors considered, and the results obtained. The petitioners do not contend that the record which was before the court is incomplete or lacks clarity in any respect. The court thus had the fullest opportunity to exercise its function under the statute. It is clear, we believe, that nothing more in the way of findings is required by the decision in *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510. No serious attempt had been made in that proceeding to determine the earning power of the entire enterprise or of any of its parts separately. The Court was concerned there with matters of substance, not with form.

The court below, while stating that the Commission's findings were not satisfactory in form, held that the form of the findings respecting the treatment of creditor claims presented only a "procedural question" which was "non-jurisdictional in character," and that on the basis of its own examination of the record it was able to pass upon and satisfy itself in all respects as to the lawfulness of the

plan. In thus disposing of "the findings requirement" the court emphasized:

> "The completeness of the evidence on the specific issue whereon findings could and should have been made.
>
> "The conclusive nature of other findings which make coverage by the missing specific findings less important.
>
> "The persuasive effect of facts shown by the record and reduced to findings by the I. C. C., which strongly support the plan submitted and approved by the District Court and the creditors." (R. 5813)

Even if the Commission's findings were not "sufficiently specific", and we think they were, the court was sound in its view that in any event the findings were "non-jurisdictional", like those under discussion in *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, 464, in which the Court said:

> "In the Florida Case (*Florida* v. *United States*, 282 U. S. 194) the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the 'complete statement of the grounds of the Commission's determination' which was declared in *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court (compare *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 675), is not fatal to the validity of the order."

In *Colorado* v. *United States*, 271 U. S. 153 (1926), an effort was made to enjoin an order of the Interstate Commerce Commission permitting the abandonment of a branch line in Colorado under the provisions of the Transportation Act of 1920. It was contended, in the words of the Court, "that the order is void, so far as it relates to intra-state traffic, because essential findings were not made

and, also, because essential findings made were not supported by the evidence." The Court rejected such a contention and refused to impose impractical requirements as to findings,[1] saying at page 169:

> "An examination of the extensive record and of the three opinions of the Commission convinces us that no relevant fact was ignored, that there was ample evidence to support the facts found * * *."

In sum, the court of appeals held in the *Milwaukee* proceeding, as it did here, that the evidence supported the plan certified by the Commission. Nevertheless, that plan, the product of almost seven years of conscientious effort, was remanded to the Commission on the ground that formal findings were indispensable, and that a definitive conclusion on every issue, fully supported by the evidence, was not enough. But seven weeks later the court refused to sacrifice substance, holding it to be sufficient here that out of its own knowledge of the record the plan was fair and equitable and, moreover, had been overwhelmingly accepted by the creditors voting. This is the nature and the measure of the conflict between the two decisions in this circuit. Our reasons for believing the *Milwaukee* decision to be erroneous, and based upon a misconception of the decisions of this Court, are stated in our petition for certiorari. (Nos. 875-83) In the case at bar the court of appeals has avoided the error which it made in that decision.

We believe that the conflict in the degree in which it actually exists, and in the light of the circumstances out of which it arises, does not furnish any foundation for review of the decision below in this proceeding. We make

[1] A short time earlier, in upholding the Commission's order as to the division of joint through rates under the provisions of the Transportation Act of 1920 against attacks on the "method of proof and of adjudication pursued," the Court had held: "Obviously, Congress intended that a method should be pursued by which a task, which is imposed upon the Commission, could be performed." *New England Divisions Case,* 261 U. S. 184, 197 (1923).

this earnest request that certiorari be denied in the belief that it is not the rule of this Court that certiorari must be granted under all circumstances and in all cases and simply as a matter of course, upon any showing of conflict.

We submit that the court's holding that the plan is fair and equitable, based upon its own examination of the record, satisfies the letter of the statute, and effectuates the legislative purpose respecting the function to be performed by the court.

II.

THE PETITIONS FOR CERTIORARI OF THE DEBTOR AND THE COMMITTEES FOR THE PREFERRED AND COMMON STOCKHOLDERS (Nos. 999-1001, 1121-2, 1190-1).

Here, as in the *Milwaukee* proceeding the Commission found, and both courts below affirmed the finding, that the equities of the preferred and common stockholders are without value.[1] The record leaves no doubt that the earning power of this railroad has been so greatly crippled that the old stock is without value. This reduction in earning power has not stopped with the destruction of value of the stock. It has cut deeply into the claims of creditors, with the result that over $41,000,000 of the creditors' claims are also valueless, and are accorded no participation in the reorganized company.

The circuit court of appeals succinctly stated the factors which have caused this result:

[1] "A plan of reorganization," Section 77(b) provides, "may include provisions modifying or altering the rights of stockholders generally, or any class of them, either through the issuance of new securities or any character, or otherwise; * * *"; Subsection (e) of Section 77 provides that: "submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, * * * that at the time of the finding the equity of such class of stockholders has no value * * *."

"The indebtedness of the debtor increased more than 110% in twenty-two years, 1919 to 1941.

"The freight traffic decreased 39% in twenty years, 1920 to 1940.

"The passenger traffic declined 51% during the same period.

"There have been large annual deficiencies for more than a decade." (R. 5801-2)

The average annual income available for interest during the ten-year period, 1931-1940, was only $6,263,108, less than one-third the amount required to service the funded debt outstanding on the effective date of the plan, January 1, 1939. (R. 5579) The Commission estimated that the income of the property available for interest in the "normal future year", without payment of any federal income taxes, would be $14,625,000. (R. 3518) In contrast with its earnings record and this estimate of its future earnings, the property would require annual earnings of $19,283,137 to service the funded debt of $431,390,104 (principal and unpaid interest on the effective date of the plan) at the average rate of 4.47 per cent. (R. 2859, 3677) If the permissible capitalization had been high enough to permit an allotment of no par common stock, taken at $100 per share, for the cancelled portion of the creditors' claims (as of December 31, 1941), there would be needed an annual income of $26,977,740 in order to pay interest on the new bonds and a 5 per cent dividend on the new stocks.

Since the available earnings are insufficient to provide income in the amount necessary to cover interest on creditors' claims, it is apparent that the equity of the old stockholders has totally disappeared. Under these circumstances, it was, of course, the duty of both the Commission and the courts to deny to the old stockholders any participation in the reorganized company. The words of the Senate Committee on Interstate Commerce in its

Report No. 454, May 18, 1939, page 5, are directly pertinent to this railroad:

> "Reorganizations cannot succeed if they are based on claimed values that have long since disappeared in a realistic sense and on business that has long since been lost to the railroads never to return. A reorganization based on a sound judgment of earning power destroys no values and creates no losses. It merely realistically recognizes the facts, including the unpleasant but nevertheless inescapable fact that values based on original cost or even reproduction cost simply do not exist without earning power to support them."

The Commission described the conditions which had brought about the "impairment in earning power" which it found to exist (R. 3578) as follows:

> "Competing forms of transportation, loss of export trade, and shifts in sources of traffic appear to have brought about a continuing change for the worse, as regards any reasonable expectation of the ability of this property to produce earnings sufficient to support a capitalization in which the present stockholders might be recognized as possessing equities of any value. Definitely a short-haul carrier, and one looking to passenger traffic for a large part of its business, results show that the debtor has proved particularly vulnerable to highway competition. Capture of traffic by pipe lines has also been a serious factor, and the pipe line system is expanding." (R. 3579)

On the subject of future earning power, the Commission said:

> "The earnings of the normal prospective year are $14,625,000. In order to pay a 5 percent dividend on the new preferred stock approved by us, earnings would have to amount to $17,778,207 a year. This preferred stock participates equally, share for share, with the common stock, to the extent of $1 a share, in any dividend paid on the common stock in excess of $5 a share. In order to pay a 6 percent dividend

> on the new preferred stock, and a 6 percent dividend on the new common stock which would have to be issued to creditors before present stockholders could be recognized, annual earnings would have to amount to $28,568,000, a figure approximating predepression record earnings. It is apparent that stock preceded by securities calling for such earnings could have only the remotest of speculative value, if any; and that any subscription warrants representative of such values would be scarcely worth the cost of engraving." (R. 3579-3580)

On the comprehensive record before it, the Commission has made the following determination:

> "From a consideration of the entire record, including the elements of value referred to, the earnings and prospective earnings, and especially the impairment in earning power of the properties, we conclude and find that this result cannot be avoided, and that the equities of both classes of stockholders have no value." (R. 3578)

The Commission's administrative determination as to the earnings value of this property was based upon studies and estimates as comprehensive and complete as any ever made in a bankruptcy proceeding. (See page 4, *supra*) The facts revealed by those studies not only support the Commission's finding that the equities of the stockholders are without value; they compel that conclusion, and both the lower courts so found.

The district court had before it the record certified by the Commission, and in addition heard a large number of witnesses called by the debtor. On the basis of the entire record the district court held:

> "Neither does the court find warrant in the evidence for disapproving the finding of the Commission that the equities of preferred and common stockholders have no value. On the contrary that finding is overwhelmingly supported by the evidence and the court

is forced to conclude as did the Commission that stockholders should not participate in the allocation of securities." (R. 5031)

"The court finds that the Commission's estimate of probable earnings in a normal future year is sufficiently optimistic and that it did not fail to give effect to any substantial evidence before it relating to earnings. The evidence introduced before the court bearing on this subject has been considered but has not moved the court to disagree with the Commission." (R. 5044)

Subsequently, at the hearing on confirmation of the plan in the summer of 1941, after full consideration of the earnings up to that time, and the reasons for such earnings, the district court once again found "that the equities of the present shareholders of the preferred and common stock herein, being Classes 19 and 20, as specified in the order fixing the classes of creditors herein, have no value." (R. 5594) The court emphasized, as one of the reasons for so holding, that the earnings of the property have been and must continue to be insufficient to service its debt. (R. 5579-80)

Moreover, the circuit court of appeals, in addition to the statements quoted above on pages 9 and 15, stated:

"It (the capitalization established by the Commission) meets our approval, not only because it is supported by evidence and is the finding of the I. C. C., but our independent study of the reports convinces us that a larger sum could not be sustained by the company's future business." (R. 5801-2)

"It must, however, be a fact of vital importance that a substantial increase in revenue and a corresponding increase in value of assets would still leave nothing upon which the old stockholders could predicate a value for their stock." (R. 5804-5)

The court of appeals held:

"The finding which determined the absence of value

in the common and preferred stock must be, and is, approved as fair to the creditors, to the stockholders, and to the public." (R. 5805)

The efforts of the debtor, and others representing the stockholders, to avoid the Commission's conclusion upon the complicated and technical issue of fact respecting the value of the equity interest do not raise any question of substance for the determination of this Court. It cannot be controverted that the evidence supporting the Commission's finding that the stock is without value, is not only ample but overwhelming, as both courts below have held. As a result, the debtor's objections take a different direction. A number of highly technical and tenuous points are raised concerning the form of the Commission's report and certain statements made by the court of appeals in sustaining it. We discuss these briefly, but the basic determination of the Commission, approved by the courts, —that the stocks are without value—is essentially unchallenged, and we respectfully assert that this leaves the stock interests without standing or interest to continue their opposition to the reorganization of this property.

The Other Considerations Urged By the Debtor Do Not Raise Any Question of Substance.

(1) The debtor states that "the primary issue" arises out of the fact that the court of appeals emphasized and gave weight to the creditors' overwhelming approval of the Commission's plan. This and many of the other questions discussed by the debtor have nothing to do with the holding that the stock may not participate in the plan. In passing upon the objections of the several mortgage trustees, we think the court very properly took note of the fact that the bondholders themselves had overwhelmingly approved the plan. But the point is entirely foreign to the status of the stock interests represented by the debtor.

The Commission having found the stock to be without value, the plan was not submitted to the stockholders. (Section 77(e)) The district court approved and affirmed that finding by the Commission, not because of the vote by the bondholders, but because "that finding is overwhelmingly supported by the evidence." (R. 5031) The court of appeals refused to set aside the affirmation of this finding by the district court, not because of the vote by the bondholders but because "our independent study of the reports convinces us that a larger sum (capitalization) could not be sustained by the company's future business." (R. 5801-2) Therefore, the court held that the finding "must be, and is, approved as fair to the creditors, to the stockholders, and to the public." (R. 5805)

(2) The debtor and the common stockholders committee contend that "the Commission erred in refusing to consider a plan of consolidating the properties of the debtor and of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company." (Debtor's Petition, p. 17; Common Stockholders Petition, pp. 13-22.)

After full hearing on this issue the Commission declined to enter upon a proceeding looking to a consolidation of these properties, finding, in part, as follows:

> "The number of persons, interests and communities that would be affected by consolidation makes it certain that it could be approved, if at all, only after very extended hearings. Where so many communities are affected, years would be taken to abandon lines and settle the other requests that are necessarily involved. Meanwhile, interest required to service existing debt is running nearly $49,000,000 a year, largely unpaid, and still further preventing the stockholders from having any interest in the property." (R. 3406)

The courts below held that the Commission committed no error of law in declining to hold up pending reorganiza-

tions while such remote possibilities were being canvassed. We submit that they were clearly right.

Because no substantial controversy exists in respect to the finding that the stock is without value, we request that the petitions for certiorari of the debtor, the preferred stockholders committee, and the common stockholders committee be denied.

III.

THE PETITION FOR CERTIORARI OF THE CITY BANK FARMERS TRUST COMPANY, TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE (Nos. 1072-3).

The holders of the First and Refunding Mortgage bonds voting on the submission almost unanimously approved the plan and the treatment which it provides for their bonds. (*Infra*, pp. 32-3) Nevertheless the City Bank Farmers Trust Company seeks certiorari. The City Bank trustee contends that the treatment of the RFC loan "establishes a yardstick" which shows discrimination "against the holders of First and Refunding bonds in favor of Reconstruction Finance Corporation or in favor of the unsecured creditors or in favor of both." (City Bank's Petition, pp. 14, 15)

A. The Treatment of the RFC Loan, to Which the City Bank Objects, Became Necessary on the Basis of the Fixed Charge Level Which the Bank Advocated and the Commission Approved.

The North Western borrowed more than $42,000,000 from the Reconstruction Finance Corporation in the years 1932, 1933, 1934 and 1935. The total debt including interest amounted to $49,184,905 on January 1, 1939, the effective date of the plan. (R. 3677) The RFC notes were secured by the pledge of collateral of $100,784,800 principal

amount. (R. 5032-3) The pledged securities are of three kinds, consisting of (a) system collateral of $48,883,800, made up of securities of affiliated companies necessary to the operation of the debtor; (b) non-system securities of $2,249,000 (having an approximate market value of $1,600,000), representing investments in companies unrelated to the operation of the system; and (c) General Mortgage bonds and First and Refunding bonds of the debtor in the principal amount of $49,652,000.

The Commission had, in theory, three methods of treating the RFC claim, as the district court pointed out—(1) paying it in cash, (2) preserving the status quo by issuing new fixed interest notes for the full amount of the claim, secured by the same collateral, replacing the debtor's bonds with the allocable proportion of new securities, or (3) permitting the noteholder to foreclose and take ownership of the pledged collateral. (R. 5033)

(1) The first method was impossible because the necessary cash was not available.

(2) The second method could have been adopted under the level of fixed charges proposed in the Groups' plan of reorganization. That plan provided fixed interest debt of $141,000,000, with the RFC being allotted fixed interest bonds for the full amount of its claim, thereby assuring the surrender of all the pledged collateral. (Ex. 495, pp. 21, 43-4) But the City Bank opposed the effort of the Groups to provide an amount of fixed interest debt necessary to deal with the RFC claim in that manner. The Commission quoted the City Bank's statement of position in its report,[1] and approved a plan providing for fixed debt in the amount of $117,000,000 (R. 3676), approxi-

[1] "The trustee of the first and refunding mortgage contends that a plan of the type proposed by the group committees could not be put into effect at the present time without grave danger that the reorganized company would fail from the start to earn its fixed charges; * * *." (R. 3560)

mately $25,000,000 less than that proposed by the Groups. The Commission found (R. 3570), and the court held (R. 5037), that on this lower basis of fixed interest debt, notes carrying fixed interest could not equitably be issued to the RFC for the full amount of its claim. To have treated the claim in that manner would have reduced by 20 to 25 per cent the fixed bonds available for allocation to all other creditors, as the court pointed out, and no party contended for such a result.

(3) The third method of permitting the RFC to foreclose upon all the pledged collateral would have taken from the reorganized company, securities of affiliated companies necessary to the operation of the road, in the amount of almost $49,000,000. This, the Commission naturally felt, must be avoided. To do so it was necessary to employ a combination of the second and third methods. The plan allots to the RFC for approximately one-half of its claim a new note secured by part of the pledged collateral, and permits foreclosure by the RFC upon the remainder thereof. The $48,883,800 of system collateral consisting of securities of affiliated companies was repledged under the $25,000,000 note, thus avoiding loss of control over properties necessary to the debtor's operation. (R. 5034) Foreclosure was allowed of the $2,249,000 of non-system securities and the $49,652,000 of the debtor's bonds.

The treatment of the RFC loan was described as follows by the district court:

> "The Commission, by a combination of the second and third methods, treated the Reconstruction Finance Corporation claim in such a way as to avoid as many of the difficulties as possible. To reduce the amount of the claim it turned over outright the non-system Union Pacific and New York Central securities; the loss of these does not disturb the system. In order to preserve intact the system collateral essential to system operations, it provided for as large

a note as those securities would support as collateral. In order to avoid an additional collateral note, thus reducing fixed charge obligations allocable to bondholders, it then allotted outright the remainder of the pledged collateral, consisting of the Debtor's General and First and Refunding mortgage bonds. Thus the Commission adopted a combination of the above methods for treating the Reconstruction Finance Corporation claim in the way which would result in the least disturbance to the system and the least disadvantage to the public holders of the Debtor's bonds. The considerations just enumerated as well as considerations set forth in earlier portions of this opinion lead to the conclusions that while the amount of securities allotted to the Reconstruction Finance Corporation is large—large because the amount of collateral presently held is large—it is not excessive." (R. 5034)

The City Bank contends that the plan "fails in important respects to conform to the law of the land as laid down by this Court" in the ***Boyd, Los Angeles Lumber,*** and *Consolidated Rock Products* decisions. (City Bank's Petition, p. 13) The City Bank does not, however, point out any particular shortcoming. Not only is the plan consistent with those decisions, but this Court in *Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648 (1935), passed upon the very issue which is the basis of the RFC treatment here involved.

In that case the Court held that an injunction may issue to "delay the enforcement of the contract," but only when shown that a sale of the collateral would prevent the formulation of a plan and that it is necessary to stay the sale to protect the reorganization process. The Court, in permitting the injunction only to "delay" the exercise of the remedy of sale, expressly stated that the substantive rights of the creditor in respect of the pledged collateral were not impaired. As stated by the Court, the question for decision was whether the bankruptcy court

had "authority to enjoin the sale of the collateral here in question if a sale would so hinder, obstruct and delay the preparation and consummation of a plan of reorganization as probably to prevent it." (p. 675) It was found that the sale would have that effect. The Court found:

> "The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action." (pp. 676-7) "The injunction here goes no further than to delay the enforcement of the contract." (p. 681)

It was on the basis of these findings that the Court answered the questions stated above in the affirmative and sustained the injunction as accomplishing merely a "delay in the enforcement of the contract." It is entirely clear from the opinion that foreclosure of the collateral is a right which may be interfered with only temporarily and to the extent necessary to permit the consummation of a plan of reorganization.

Here, likewise, under restraint of the injunction by the district court, the collateral was not sold or reduced to possession by the noteholder during the time necessary to formulate and promulgate a plan of reorganization. (R. 11) The statutory process was fully protected. The Commission and the court, however, took the "further action" contemplated in the Rock Island opinion by certifying, approving, and confirming the plan of reorganization. Certainly the foreclosure provided in the plan cannot "hinder, obstruct and delay the preparation and consummation of a plan of reorganization." Instead the Commission and the courts found that foreclosure to the extent permitted, was absolutely necessary to effectuate the

reorganization of this property. The district court, which entered the injunction against sale of any collateral pending a plan, found, in its opinion approving the plan, that the Commission has provided treatment for the RFC "which would result in the least disturbance to the system and the least disadvantage to the public holders of the Debtor's bonds." (R. 5034)

The circuit court of appeals also pointed out that:

> "* * * if we assume that the plan be rejected and the proceedings dismissed, its [the RFC's] legal right so to do [foreclose on its collateral] would be clear.
>
> "However, the debtor would be greatly embarrassed through the sale of $94,000,000 of its obligations for less than fifty cents on the dollar. The I. C. C., therefore, at the expense of the R. F. C. sought to protect the debtor. Protecting the debtor was protecting all of the other groups of security holders." (R. 5815)

The fact that the Commission found that it could not soundly commit the reorganized company to pay fixed interest in an amount sufficient to hold this large loan in status quo, and allowed the RFC to foreclose on a portion of its collateral in order to cause the least possible shock to the debtor's system and its bondholders, does not render the plan discriminatory in any respect.

B. The Commission's Treatment of the RFC Claim Does Not Show the Plan To Be Discriminatory Against the Holders of First and Refunding Bonds and in Favor of the Unsecured Creditors.

The City Bank trustee contends that the Commission, by permitting the RFC, as pledgee, to foreclose on certain of the collateral held by it, put a value upon the new securities allotted to the First and Refunding mortgage of less than forty cents on the dollar. Upon this premise it is asserted that the claim of the First and Refunding bond-

holders was not satisfied, and therefore that any allotment to the unsecured creditors was unlawful. The Bank is mistaken. As the district court held, with the circuit court of appeals affirming:

> "The treatment of the Reconstruction Finance Corporation proves nothing whatsoever as to the value of the new securities except that the Commission believes that the new securities allotted to the Reconstruction Finance Corporation could not be liquidated for an amount in excess of the Reconstruction Finance Corporation claim." (R. 5022-23)

The treatment of the RFC does no more than recognize its right to the ownership of the system bonds. The attack of the City Bank upon the plan rests upon the fact demonstrated by the treatment of the RFC claim, that those bonds cannot presently be liquidated at one hundred cents on the dollar; consequently, it is argued, the holders of those bonds have not been fully compensated, and, therefore, unsecured creditors should be excluded from the plan. Although the City Bank refrains from so stating, this is an argument that the fairness and the lawfulness of the whole reorganization plan must be judged on the basis of the *present cash market value* of the new securities rather than upon a determination of a proper capitalization and valuation of the property as a whole in the light of its probable future earning capacity and all other relevant factors. This is not the law.

An extensive railroad system, taken as a whole, does not have a cash market value in any practical sense. *N. C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 370 (1940). As was said in the *Kansas City Terminal* case, "Practically, it is impossible to sell the property of a great railroad for cash." (271 U. S. 445, 455) It would not be sensible to base a reorganization plan on an assumed or theoretical cash price which no one would actually pay. Instead this

Court has repeatedly said that the offer must be fair in the light of all the circumstances and very recently has clarified those statements by declaring that the criterion of future earning capacity is controlling. *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510, 526 (1941)

The *Boyd* case itself makes clear that current cash market values are not determinative. The Court said:

> "This conclusion does not, as claimed, require *the impossible* and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of *income bonds* or *preferred stock.*" (228 U. S. 482, 508)

If reorganization plans were based on current cash values, there would be nothing at all "impossible" in paying in cash every claimant participating in the plan whether secured or unsecured. The reorganized company could do so merely by selling the securities allotted to each claimant and paying him the cash proceeds. The court recognized in the *Boyd* case that any such action was "impossible" because plans of reorganization are not based on cash value, and specifically held that full observance of the rule of priorities does not require the satisfaction of the senior claims in cash. It is perfectly evident that the "income bonds or preferred stock" to which the Court referred in the foregoing quotation would not sell for par or anything like it on the effective date of the reorganization.

That the values to be considered are not restricted to present cash values was also stated by the Court in the *Kansas City Terminal* case, 271 U. S. 445, 455, as follows:

> "Unsecured creditors of insolvent corporations are entitled to the benefit of the values which remain after lien-holders are satisfied, whether this is *present or prospective,* for dividends or only for purposes of control."

It cannot be emphasized too strongly that none of the equity cases ever purported to determine or to satisfy the priorities of the parties participating in the plan on the basis of the present cash value of their interests. It is a matter of common knowledge that if the distribution of new securities were based on the bids at a foreclosure sale, or on present cash values, however determined, all claimants beyond the first lien bondholders would be excluded in practically every instance.

It is obvious that the North Western could not be sold for a sum in cash equal to the amount now due on the divisional and General Mortgage bonds and claims ranking prior thereto. If the Commission had attempted to allot securities on that basis, it must have given the First and Refunding bonds a much smaller interest than they receive in the present plan. The allocation of securities among the various classes of creditors must rest upon the earning capacity of the various properties which comprise the system, and that likewise must be an estimate. With such estimates as its foundation the Commission arrived at a capitalization of all the assets of the enterprise, both mortgaged and free, which substantially exceeds the total of the secured debt against the company, but is much below the aggregate of the claims of all creditors.

In its original report, the Commission states:

> "This allocation, taken with the allocation of fixed interest securities already mentioned, will, with adjustments, correctly reflect the relative earning power of the several mortgage lines under the conditions of the normal prospective year, and the relative value of other claims as compared with those secured by mortgage." (R. 3575)

The supplemental report, discussing the petition of holders of certain unsecured Convertible bonds for more favorable treatment than they were accorded in the plan, states:

> "The bonds are thus not secured by mortgage or other lien on any property and can participate in the

> reorganization only on the basis of the free assets and the value of pledged assets in excess of liens thereon." (R. 3669)

The capitalization as determined by the Commission does not permit the satisfaction in full of the claims of the holders of these Convertibles totaling $86,651,302 and other unsecured debt. Instead, the Commission found that under the plan more than $41,000,000 of such claims must be canceled and the balance recognized only in no par common stock. (R. 3677) On the other hand, the debtor's secured creditors not only receive 100 per cent of their claims in new securities, including varying amounts of fixed interest and contingent interest bearing bonds, and preferred stock, but the common stock received by the secured creditors is taken by them on a much more favorable basis than that upon which the common stock is taken by the unsecured creditors. This method of recognizing and preserving the priorities was expressly sanctioned in the *Kansas City Terminal* case, and that decision was cited and relied upon both in the *Los Angeles Lumber Company* case and in the more recent decision in the *Consolidated Rock Products* case.

The plan recognizes and fully protects the rights of the First and Refunding bondholders, the RFC, and the unsecured creditors, both as to their absolute rights; and as to the rights of each in relation to the others. We submit that the contention that the priorities have been violated because the plan and the treatment of the various classes of creditors is not based on present cash market values does not present a question of substance for the determination of this Court.

C. The First and Refunding Bondholders Have Overwhelmingly Disapproved the City Bank's Attack on the Plan.

Upon receipt of the district court's opinion of approval, the Commission submitted the plan to the affected creditors for acceptance or rejection, in accordance with the mandatory direction of the statute.[1] Along with the ballot, the Commission sent each creditor a printed pamphlet containing the plan, the Commission's original and supplemental reports, and the opinion and order of the district court approving the plan, as Section 77(e) provides.[2] In addition to the comprehensive discussion in the Commission's reports of all factors relevant to the formulation of the plan of reorganization, including treatment of the RFC loan and all other claims, five printed pages of the pamphlet were devoted to a full discussion by the district court of the City Bank's objections to the plan. (pp. 151-156 of submission pamphlet; R. 5019-5025)

The results of the submission which were certified to the court showed that holders of $24,090,000 principal amount of First and Refunding bonds, or 97.75 per cent of all First

[1] Section 77(e) provides in part: "If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed • • • for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: • • •."

[2] The submission pamphlet is a part of the record but is not reprinted. (R. 5703, 5826)

and Refunding bonds voting,[1] had accepted the plan, and $552,000, or 2.25 per cent, had rejected it. (R. 5318) Of the $552,000 voting against the plan, only $163,000, or 29.53 per cent, were voted by holders other than the City Bank which itself voted $389,000, or 70.47 per cent, as trustee of various trusts. If the $389,000 of First and Refunding bonds voted in rejection of the plan by the City Bank (together with a $1,000 bond which the City Bank voted in acceptance of the plan) were disregarded, the percentage approving the plan would be increased from 97.75 per cent to 98.91 per cent.[2] Notwithstanding this overwhelming rejection of the City Bank's position it has continued its efforts as mortgage trustee to defeat the plan of reorganization which its bondholders have almost unanimously approved.

D. City Bank's Miscellaneous Objections to the Procedure Adopted in Certifying, Approving and Confirming the Plan.

(1) *Absence of Information in Submission Pamphlet Concerning City Bank's Appeal From the Approval Order.*

The City Bank contends that the Commission in submitting the plan for acceptance or rejection "failed to disclose the material and relevant fact" that it, as trustee, was appealing from the order of the district court approving the plan. (City Bank's Petition, p. 11) The explicit terms of Section 77(e) answer this contention. In making the submission the Commission distributed precisely the material that the statute directed it to send to those entitled

[1] Section 77(e) provides in part that: "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan * * *."

[2] Copies of the ballots were certified to the court by the Commission and are parts of the record but not reprinted. (R. 5599, 5826)

to vote, namely, "the plan * * * together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge * * *." (Section 77(e)) The reports of the Commission and the opinion and order of the judge were printed and distributed in full text.

(2) *Weight Attributed to the Vote of Acceptance.*

The City Bank further contends that "Coupled with the refusal of the Commission to advise the independent bondholders of the appeals taken by their mortgage trustees," improper emphasis was placed on the overwhelming vote of the bondholders accepting the plan. (City Bank's Petition, p. 29) On the contrary, the opinion shows quite clearly that the court below, while properly emphasizing the overwhelming vote of approval, made an independent finding that the plan is fair and equitable. (R. 5809, 5810, 5813)

(3) *Continuance of Litigation by Mortgage Trustee After Overwhelming Acceptance of Plan by Bondholders.*

The City Bank objects to the dictum of the circuit court of appeals criticizing the activities of certain mortgage trustees. The court, however, answered any possible objection in this regard when it said that: "Coming now to the more specific questions, *and conceding the right of the trustees to raise them,* we take up the criticisms of the bondholders of the different groups." (R. 5813)

The petition of the City Bank as trustee under the First and Refunding mortgage does not present any important or special reason in support of its request for a writ of certiorari, and should be denied.

IV.

THE PETITION FOR CERTIORARI OF IRVING TRUST COMPANY, TRUSTEE UNDER THE MILWAUKEE & STATE LINE MORTGAGE (Nos. 1087-9).

The principal ground of objection by this trustee is directed to the method by which the Commission determined the earnings value of the Milwaukee & State Line. This line secures an issue of $2,500,000 first mortgage bonds.

As a basis for its determination of the value of the respective mortgage lines the Commission had before it, among much other data, the results of three studies, called, for convenient designation, segregation, severance and contributive income studies.

The Commission described the three earnings studies as follows:

> "As a basis for the proper allocation of this $62,243,000 of new fixed-interest securities the record contains extensive studies along three lines of approach, namely, segregation of earnings, severance value, and contributive income value. In the segregation studies it was determined what the separate earnings of each mortgage line have been on the basis of the traffic as it actually moved, revenues being assigned according to a formula reflecting as close an approximation as possible to the divisions of joint rates which would normally have been applied if the individual mortgage lines had been separately operated railroads, and hauls of company material being adjusted for on a cost basis. The formula, being based on the actual movements of traffic, does not take into account the fact that if the system were broken up much of the traffic might be differently routed; or in lieu of a different routing something other than the usual division of rates might have been arranged. The segregation studies were accordingly supplemented by the severance studies. The latter show in each instance the loss of system net income which would result from the severance of the particular mortgage line. In each

instance where the severance method was adopted as the basis of ultimate valuation, it was found that the line in question was of greater value as part of the system than as severed therefrom. The contributive income studies show the benefit derived by the system from the traffic originating or terminating on each mortgage line." (R. 3571-2)

A. Objections to Commission's Method of Determining State Line Earnings Were Correctly Overruled.

It is contended that the Commission should not have followed the severance value studies and that it should, instead, have adopted the segregation basis. The trustee further urges that if the Commission did not err in using the severance value studies, then they should have been given weight only for the future and not for the past, and also that the entire amount of the earnings, measured by the severance studies, should have been capitalized into fixed interest bonds. These contentions were considered at length by the Commission, both in its original report and in the supplemental report, and were unanimously rejected by the full Commission as having no merit. They were again discussed fully by the district court and again rejected. (R. 5013-9) The circuit court of appeals affirmed these rulings of the Commission and the district court. (R. 5815)

The determination of earnings of a particular line in a railroad system is a matter in which "the inquiry is essentially one of fact and of discretion in technical matters" and which is peculiarly within the competence of the Commission. *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. As this Court stated in the *Consolidated Rock Products* case:

> "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case." (312 U. S. 510, 527)

The facts of this case were determined by the Commission. Its determination was made upon a very comprehensive record. The trustee does not contend that the record is incomplete or lacks clarity in any respect. We submit that the State Line trustee's criticisms of the Commission's conclusions furnish no ground for certiorari, and propose to show further that the reasons stated by both courts below for upholding the Commission's determination were correct.

(1) *The Commission's Use of Severance Studies to Determine Earnings of the State Line.*

The State Line trustee has cited cases in which segregation studies were approved, as if all lines of railroad were alike and the earnings of all could be measured by a single formula. The fact is, however, that the State Line is not an ordinary line of railroad. It was constructed solely to provide a by-pass line for the purpose of making a saving to the system through reduced expenses. (R. 5017) It controls no traffic. Indeed, there is not a single station on the line, although during short periods of the year, local trains will stop to pick up cabbage, and some sand and gravel for road work is unloaded on the line. (R. 3068) Over 96% of its traffic neither originates nor terminates on the line. (R. 1653) Referring to the State Line and to certain other segments of the North Western's system, the earnings of which were also found to be properly determined by the severance value studies, the Commission stated that:

> "* * * their function is almost wholly to serve as bridge lines for the more economical handling of traffic which would otherwise be carried by alternate routes over general mortgage lines." (R. 3582)

Any piece of road like the State Line, the function of which is solely to provide an alternative route for a seg-

ment of the system main line, has a value to the system which is measured only by the amount the system saves by using the alternative route.

The detailed severance studies prepared by the debtor's officers and by other experts showed that the traffic routed over the State Line could be handled, instead, over the General Mortgage lines as in fact it was, prior to the construction of the State Line. (R. 3123) To do so, however, would increase the system's expenses approximately $51,000 in an average depression year, $57,000 for the year 1936, and somewhat larger amounts in the normal prospective year. (I. C. C. Ex. 594, pp. 3, 8, 11; R. 3244, 3249.) Those figures, the Commission found, represent the amount which the use of the State Line is worth to the system in the respective years, and measure the yearly "earnings" of that line. The argument advanced is that the Commission should be compelled to accept the results of the segregation studies as establishing the value of the State Line rather than to measure its value by the savings which it produces as an alternative route. This means that in determining the value of the respective mortgage divisions the Commission must credit the State Line with the revenue derived from all the traffic which moves over that line, notwithstanding the fact that that traffic is wholly produced and controlled by other lines, and that the continued use of the State Line has value only in the degree that it results in more economical operation.

The Commission considered the arguments of the State Line trustee at length. The contributive income studies described by the Commission showed practically no value for the State Line, for there is almost no traffic originated or terminated on that line. That result obviously did not constitute a fair measure of its earnings value and the Commission did not rely on those studies in allocating new securities to the State Line.

It was also apparent that the results of the segregation studies did not reflect the true earning position of the State Line since those studies did not take account of the fact that other mortgage lines originated and controlled the traffic which was routed over the State Line merely for the purpose of system convenience and economy. In the words of the Commission:

> "Some would have the segregation studies applied to the exclusion of the severance studies. The segregation studies, as has been stated, fail to take into account the fact that if the system were broken up much of the traffic might be differently routed than at present." (R. 3583)

The State Line trustee contends that the severance value of the State Line should have been disregarded because the studies involved the making of estimates and the exercise of judgment as to the ability of the present General Mortgage lines, with such additional construction as might be necessary, to handle the traffic which has been routed over the State Line. The trustee's brief repeatedly asserts that the alternative routes over the General Mortgage lines are "hypothetical," "non-existent" and "impracticable." (For example, see p. 44 of Trustee's Brief.) This contention, also, is one which the Commission, as an expert administrative body, was uniquely qualified to consider. The Commission's report stated as follows its conclusion on this point with regard both to the State Line and to the other bridge lines:

> "The other objections of the trustee go to particulars of the application of the general theory of the severance studies; questioning the ability of the company to provide the alternate routes and maintain train schedules thereon with expenditures for additional facilities no greater than those estimated in the studies. Such questions have been sufficiently covered by the testimony of competent engineers and operating officials of the railroad, and the group committees, the weight of which supports the assumptions on which

the conclusions of the severance studies are based. These objections are not sustained.'"[1] (R. 3584)

The district court reviewed at length the methods by which the Commission had determined the earnings value of the State Line and the other bridge lines, including the Sparta. (R. 5013-5019) Its discussion included a detailed statement of the relative merit of segregation and severance studies as applied to bridge lines. (R. 5016) Its conclusions were expressed as follows:

> "The contributive income study is not a fair measure of the earning power of the three lines since no one of the three originates or terminates any substantial volume of traffic. Neither was the segregation study a fair measure of the earning power of the three lines. It reflected the earnings on traffic as it actually moved and ignored the fact that the control of such traffic was not in the hands of the bridge line over which it happened, for system convenience, to move. The value of a bridge line to a system is that which it saves the system in providing a more economical route. A severance study measures that value. For this reason the severance study was adopted by the Commission and is adopted by the court as the measure of value of the three lines in question." (R. 5017)
>
> "The assumption that since the segregation study showed relatively large earnings by the Sparta line the Sparta bondholders were disadvantaged is without foundation. We have seen that since the Sparta line is a bridge line, which does not originate or terminate traffic, the only fair measure of its value to the system is a severance study. Accordingly, the showing of a segregation study on the line is of no disadvantage or advantage to any one, it is simply of no significance." (R. 5017)

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[1] The Acting General Manager of the debtor testified before the Commission that the studies provided for facilities "to satisfactorily handle the diverted traffic and effect a service equal to that now provided by use of the Milwaukee and State Line Railway." (R. 3153)

The State Line trustee seems to contend that Section 77 of the Bankruptcy Act requires the Commission to treat the segregation formula as if it were the mandatory and exclusive measure of the earnings value of all lines of railroad. (Petition of Irving Trust Co., p. 44) While Section 77(c)(10) refers to the keeping of accounts which will permit of "a segregation and allocation * * * of the earnings and expenses," it does not specify the method by which the true earnings are to be ascertained nor limit in any manner the scope of the Commission's inquiry into the factors which determine the real earnings value of a particular line. As the Court stated in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527:

> "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case."

(2) *Determination of Past Earnings of State Line.*

The argument that the Court should require the Commission to treat the segregation study as a proper measure of earnings for the past years, as distinguished from the future, was considered and rejected by the district court as follows:

> "Referring to the State Line Trustee's objections that the plan fails to give any weight to the earnings of the mortgaged property as actually operated since the date of filing of the Debtor's petition, the court cannot see why the past earnings of a bridge line should be measured by a different yard stick than the future earnings. The plan uses the same yard stick for both —a severance study—and correctly capitalizes earnings past and future on that basis." (R. 5018-19)

The trustee's claim that this conclusion was opposed by the testimony of one witness is not correct. (Petition of Irving Trust Co., p. 46) The testimony referred to, which was from another case, dealt only with the question whether

a severance value study of the New Jersey, Indiana and Illinois R. R., which is not a cut-off or bridge line, would determine its actual earnings. (R. 4358; Sav. Bank Com. Ex. 3) In striking contrast with the State Line, 84% of the traffic of the N. J. I. & I. originates or terminates on its line. (Sav. Bank Com. Ex. 3, p. 6)

The petition and brief of the State Line trustee contains repeated references to the figures shown by the segregation studies as if they were the "earnings" of the line. (For example, see p. 20) Those statements are misleading unless it is constantly borne in mind that the Commission and the lower courts found that the segregation studies did not show the true earnings of the State Line, and that the actual earnings of that line were shown by the severance studies.

The trustee's assumption that the earnings of the line are shown by the segregation studies is reflected in its argument that the lower courts have refused "to give effect to a pledge of income under a corporate mortgage." (Petition of Irving Trust Co., pp. 40, 41) The alleged discrimination between the State Line and other issues is based upon the same theory. (*Ibid.*, pp. 6, 11-12) No one questions the lien of the State Line mortgage on the actual earnings from its property. On the basis of its actual earnings as found by the Commission and confirmed by the court, it has been accorded fair and equitable treatment in the reorganization plan. Its claim for an impounding of its earnings is simply an effort to obtain payments in cash which would give it better treatment than is provided in the plan either to it or to other comparable issues. The lower courts properly held that approval of the plan renders moot the effort to attack it collaterally.

(3) *Contention that All Earnings of State Line Should Have Been Capitalized into Fixed Interest Bonds.*

The State Line trustee also claims that all of the earnings of the State Line, measured by the severance value studies, should have been capitalized into fixed interest bonds. The Commission decided that it was necessary to establish a margin of safety for the reorganized company and therefore capitalized into new fixed interest bonds only $3,400,000 of the average system depression earnings, which were approximately $5,600,000. (R. 3569) Of the available fixed charges, part were required to provide for fully secured claims such as equipment trust certificates. To require the Commission to set the fixed charges at such a level that all estimated depression earnings would be paid out as fixed charges would seriously endanger the success of the reorganization. The district court stated the answer to this contention as follows:

> "The Sparta Trustee objects that if severance value is to be used as a basis for allocation to the Sparta bondholders, then new fixed interest bonds should be allocated to an extent which will capitalize the dollar severance value. This objection cannot be sustained. Everyone recognizes that all of the earnings of the system cannot be capitalized in fixed interest bearing securities. It is imperative that the total earnings be capitalized partly in interest bearing securities and partly in stock and reasonable that they be capitalized partly in fixed interest bearing securities, partly in contingent interest bearing securities, and partly in preferred stock and partly in common stock, and it is both reasonable and fair that that part of the earnings ascribable to the Sparta line be capitalized in like manner. Like objections by the State Line Trustee and the Peoria Trustee are overruled for the same reason." (R. 5018)

B. No Substantial Question Is Presented by the State Line Trustee's Objections to Confirmation of the Plan Notwithstanding Its Rejection by Holders of a Minority of State Line Bonds.

Of the creditors voting on the plan, more than two-thirds of every class accepted it except Class 8, consisting of the holders of State Line mortgage bonds, of which the acceptance was by only a majority. The statute provides that if two-thirds of every class voting on the plan shall have accepted it, the court shall confirm the plan, provided such acceptances shall not have been procured by means forbidden by law. The statute does not specify a hearing in that event. If, however, "the plan has not been so accepted by the creditors", the statute provides for confirmation by the judge *after hearing,* if he is satisfied and finds: (1) that it makes adequate provision for fair and equitable treatment of the interests of those rejecting it; (2) that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and (3) that the plan conforms to the statutory requirements requisite to approval of the plan. (Section 77 (e))

In the present case, at the hearing on confirmation, evidence was presented as to the relevant facts concerning the rejection by the 49.63 per cent of the State Line bondholders who voted against acceptance of the plan. The evidence before the court on the hearing on confirmation showed that holders of bonds in the amount of $1,067,000 voted against acceptance of the plan, and that of these, $1,003,000 of bonds were voted by a single holder, namely, the Equitable Life Assurance Society and its affiliate, the Equitable Credit Union. (R. 5467) The four other holders of bonds who voted against acceptance of the plan held $64,000 face value. (R. 5467) The certificate of the Commission on the submission to creditors showed that holders

of $1,083,000 of bonds, or 50.37 per cent, voted to accept the plan. (R. 5317) The State Line bonds voting against acceptance are thus less than one-half of one per cent of the principal amount of all the debtor's bonds and debt securities of all classes which voted on the submission of the plan. (R. 5316-5319) Of creditors of all classes voting, 96.2 per cent in amount voted to accept the plan, and only 3.8 per cent to reject it, including the holders of State Line bonds.

The court had evidence that the Equitable Life Assurance Society had neither appeared nor participated in any way in the proceeding before the Commission looking toward reorganization, and that its participation before the district court at the hearings on the approval of the plan was limited to a three-sentence statement of position by its counsel. (R. 4562) Neither the Equitable nor any other holder of State Line bonds appealed from the orders of approval or confirmation or is petitioning for certiorari, the appeal having been taken and the petition for certiorari filed only by the mortgage trustee. After hearing the evidence for and against confirmation of the plan, the district court made the requisite findings. (Opinion, R. 5581; Decree, R. 5591-6)

The State Line trustee appealed from the decree, and in affirming it the circuit court of appeals stated:

> "The bond issue [State Line bond issue] is to secure a $2,500,000 loan. Over half of the bondholders in volume and number favor the plan. Less than one-half or about $1,000,000 in volume, are opposed to the plan. One creditor, with a claim of less than one-fourth of one per cent of debtor's total indebtedness is attempting to block and defeat the plan. And said creditor is speaking through a trustee who is misrepresenting a majority of the holders of bonds for whom

it speaks. And more, it asks compensation for itself and its counsel for performing this work."[1] (R. 5815)

As a reason in support of its petition for certiorari the State Line trustee states that "The decision of the Circuit Court of Appeals in confirming the Plan in spite of the failure of the requisite percentage of State Line bondholders to vote in favor thereof is based on an erroneous interpretation of Section 77(e)." (Petition of Irving Trust Co., p. 26) It may be noted, first, that the plan was confirmed by the district court and not by the circuit court of appeals. The petitioner's erroneous view that the appellate court is required to confirm the plan underlies much of its argument. Similarly, it contends that "the appellate court" is "required to determine the reasonableness of the rejection." (Petition of Irving Trust Co., p. 36) Section 77(e), on the contrary, provides for confirmation of a plan which has not been accepted by two-thirds of the creditors of each class by "the judge," clearly meaning the district judge and not the circuit court of appeals. This Court has so held in *Dickinson Co.* v. *Cowan*, 309 U. S. 382, 383 (1940).

The holding by the circuit court of appeals was that the evidence before the district court was sufficient to support its findings. (R. 5815) The petitioner does not challenge this conclusion or the sufficiency of the evidence. Instead, it contends that a finding is also necessary "that the rejection has been motivated by considerations foreign to the question of fairness of treatment or that the plan is so clearly favorable to the class in question that no reasonable man could do otherwise than accept it." (Petition of Irving Trust Co., pp. 34-5) The statute, however, makes no such requirement. The petitioner would read out of the statute the phrase which immediately follows and qualifies

[1] The court's reference here is to the contention of the trustee, which it appears now to have abandoned, that the allowance to it and its attorneys should be increased beyond the maximum of $16,654 which was fixed by the Commission pursuant to the provisions of Section 77(c)(12).

the words "not reasonably justified," namely, "in the light of the respective rights and interests of those rejecting it and all the relevant facts." Nor does the statute make necessary any finding that the minority of State Line bondholders who rejected the plan were "irrational in believing that the Plan did not give full recognition to their rights." (Petition of Irving Trust Co., p. 35) On the contrary, the findings which were made comply with the statute, and are fully supported by the evidence.

Although stating doubts as to the constitutional limits of the bankruptcy power, the petitioner avoids any direct charge that Section 77(e) or the court's action thereunder is unconstitutional. (See Petition of Irving Trust Co., pp. 21, 24, 26, 33, and 38-40) The authorities cited by the trustee readily explain this. Comments are quoted from the opinions in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935), and *Canada Southern Railway Co.* v. *Gebhard,* 109 U. S. 527 (1883), to the effect that bankruptcy compositions have been authorized when the composition was assented to by the required majority of the creditors. But this fact was not the basis of the decisions of the Court to which the trustee refers. In the *Radford* case the first Frazier-Lemke Act was condemned because of its plain purpose to enlarge the rights of the mortgagor at the expense of the mortgagee. The Court stated at page 589 that:

> "* * * the Frazier-Lemke Act is the first instance of an attempt, by bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security."

The issue decided by the Court was stated as follows at page 601:

> "The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value."

The *Radford* case is not applicable here.

In the *Gebhard* case this Court, as early as 1883, in reviewing the historical development of bankruptcy compositions, recognized the basis of such provisions as that contained in Section 77(e).[1] Following the words quoted by the petitioner, the Court stated:

> "Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty, and property. Bankrupt laws, whatever may be the form they assume, are of that character." (*Canada Southern R. Co.* v. *Gebhard* (1883) 109 U. S. 527, 536)

Certainly, reorganization on a sound financial basis of interstate railroads which are the essential arteries of national commerce, is not to be prevented by a few creditors, when the reorganization court finds that the plan provides fair and equitable treatment for their interests.

The only other authority cited in regard to the constitutional power of a bankruptcy court is *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, concerning which the trustee states that: "This case clearly points to the fact that the bankruptcy power is limited by requirements of due process." (Petition of Irving Trust Co., p. 39) If the petitioner intends to imply by this statement that the action below is lacking in any of the requirements of due process, such an implication is answered by numerous decisions of

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[1] Half a century later the Court, in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648 (1935) again reviewed the constant growth of bankruptcy procedure, and said at page 671: "The fundamental and radically progressive nature of these extensions [of the bankruptcy power] becomes apparent upon their mere statement. * * * Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and the development of human activities from 1800 to the present day."

the Court. As stated in *Nebbia* v. *New York*, 291 U. S. 502, 525:

> "* * * the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

The procedure prescribed in respect to confirmation by the court provides ample protection for dissenters. A further hearing must be held and the judge must be satisfied and find that the plan provides fair and equitable treatment for those rejecting it and that the rejection was not reasonably justified. He must also make the findings specified in clauses (1) to (3), inclusive, of subsection (e). The nature of the proceedings held in this case in strict accordance with the requirements of the statute and the findings which were made after consideration of all the evidence, preclude the contention that any constitutional rights of the few bondholders who seek to obstruct the plan have been violated.

The State Line trustee's contentions are, we submit, wholly lacking in substance, and its petition for certiorari should be denied.

V.

THE PETITION FOR CERTIORARI OF SUSMAN, ET AL., HOLDERS OF UNSECURED CONVERTIBLE BONDS (Nos. 1002-3).

The debtor's 20-year Convertible 4¾ per cent Series A bonds of 1949 are outstanding in the principal amount of $72,335,000. Certiorari is asked on behalf of one Susman and others owning these unsecured bonds in the principal amount of $29,000, being four hundredths of one per cent of the principal amount outstanding. Eighty-seven per cent of the Convertibles voting on the plan accepted it. (R. 5319)

It is contended on behalf of Susman that the plan's treatment on the same basis of the Convertibles and the small amount of general claims is erroneous, for two reasons. The first is that the Convertibles are entitled under the indenture securing them to receive "$105 for each $100 plus accrued interest" if redeemed prior to 1944. (Abrams' Petition, p. 22) But the Convertibles are not in any sense being voluntarily redeemed pursuant to the provisions of the indenture. The fact that the Commission found that the permissible capitalization requires elimination of the old stockholders and cancellation of almost half of the Convertibles' claim, with the balance being recognized in new common stock, shows the extreme nature of the contention that a provision for payment of a premium upon redemption has any force in this proceeding.

The second ground of objection is that through "subrogation or conversion" the Convertibles acquired a lien on the Omaha bonds pledged with the Reconstruction Finance Corporation. Such a contention is frivolous, as shown by the opinion of the district court. (R. 5047-48)

We pray that the petitions for certiorari be denied.

Respectfully submitted,

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APPENDIX.

Chronology of Proceeding.

On June 28, 1935, the debtor filed its petition for reorganization under Section 77 of the Bankruptcy Act. (11 U. S. C. A. Sec. 205) Pursuant to Section 77(d), public hearings were held by the Commission on September 9, 10, 11 and 12, 1935; March 23 and 24, 1937; May 25, 26, 27 and 28, 1937; December 15, 16, 17, 18, 20, 21 and 22, 1937; and April 19, 20, 21 and 22, 1938. (R. 1472-3395) The record before the Commission consists of 3,584 pages of stenographic transcript and 596 exhibits, ranging from a single sheet to several hundred pages of data.

The many parties filed several sets of briefs before the Commission and on April 18, 1939, the Commission issued a proposed report on a plan of reorganization. (R. 3408-3501) Thereafter, exceptions to the proposed report, and briefs in support of the exceptions, and later, briefs in reply thereto, were filed. Oral arguments were heard by the entire Commission on June 29, 1938.

The initial report and order of the Commission approving a plan of reorganization were issued on December 12, 1939. (R. 3503-3661) Petitions for modification of the initial plan were filed on behalf of numerous parties and answers were filed to those petitions. On April 2, 1940, the Commission issued a supplemental report and order by which it modified the plan in certain respects, and as modified, approved and certified the plan to the district court. (R. 3661-3711)[1]

On April 15, 1940, the district court entered an order fixing the time within which objections to the plan and claims for equitable treatment might be filed. (R. 3808-

[1] Tables are annexed to the supplemental report showing the new capitalization, the charges and requirements thereunder, and the securities outstanding before reorganization, together with the distribution of new securities provided in the plan. (R. 3676-7)

3810) Hearings were held by the district court on the approved plan and on the objections thereto on June 24, 25, 26 and 27, and thereafter, on petition of the debtor, on July 22, 23, and 24, 1940. (R. 4084-4952) Voluminous oral and documentary evidence was introduced before the court in addition to the record certified to the court by the Commission, several sets of briefs were filed, and the matter was extensively argued by counsel for all parties. On September 11, 1940, the district court filed its opinion approving the plan (R. 5007-5059), and on October 12, 1940, entered its findings of fact, conclusions of law and decree approving the plan. (R. 5072-5091)

On January 22, 1941, the Commission submitted the approved plan to the creditors for acceptance or rejection, in accordance with the direction of Section 77(e). By order of May 13, 1941, the Commission certified the results of the submission to the district court. (R. 5314-5326)

By order of May 19, 1941, the district court set a hearing for June 23, 1941, to determine whether the plan of reorganization theretofore approved should be confirmed. (R. 5327-5328) The hearing was held, as set, and the evidence taken and arguments heard in support of and in opposition to confirmation of the plan. (R. 5376-5552) On June 25, 1941, the district court filed its opinion confirming the plan. (R. 5569-5582) On June 27, 1941, the district court's decree confirming the plan, containing also its findings of fact and conclusions of law, was duly entered. (R. 5591-5596)

Appeals were taken to the circuit court of appeals from the order approving the plan and from the order confirming the plan, and were consolidated. (R. 5703) The appeals were argued on December 29, 1941, and on February 9, 1942, the circuit court of appeals rendered its opinion and judgments affirming the orders of the district court approving and confirming the plan of reorganization. (R. 5787-5816) The petitions for writs of certiorari are from judgments affirming the orders of the district court.

DEC 22 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

MOTION TO SUPPLEMENT RECORD.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor, Petitioner.

December 17, 1942.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

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Respondents.

MOTION TO SUPPLEMENT RECORD.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned counsel for the Chicago and North Western Railway Company, Debtor, petitioner in the above-entitled cases, respectfully make the following motion on behalf of said petitioner:—

1. That a certified copy of the statement of assets and liabilities of the Debtor, Chicago and North Western

Railway Company, as of October 31, 1942, and the summary of revenues and expenses of said Debtor for the month of October, 1942, as filed with and certified by the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, the same having been filed therein by Charles M. Thomson, Trustee of said Debtor's estate on December 8, 1942, and a copy of which is attached as "Appendix A" hereto, be made part of the record in these proceedings to be considered in connection with said Debtor's petition for writs of certiorari in these proceedings.

2. That the memorandum, prepared and certified by C. H. Westbrook, Comptroller for the Trustee of Debtor's estate, dated December 15, 1942, showing cash assets as of October 31 and of November 30, 1942, income available for fixed charges before income taxes, and amount of indebtedness from Debtor to Reconstruction Finance Corporation as of October 31, 1942, copy of which is attached as "Appendix B" hereto, be made part of the record in these proceedings to be considered in connection with said Debtor's petition for writs of certiorari in these proceedings.

HELEN W. MUNSERT,

LUTHER M. WALTER,

Attorneys for Chicago and North Western Railway Company, Debtor, Petitioner.

Dated at Chicago, Illinois.
December 17, 1942.

BRIEF IN SUPPORT OF MOTION.

Subsequent to December 19, 1939, when the plan of reorganization of the Debtor, certified by the Interstate Commerce Commission, was first filed in the District Court, and subsequent to the filing of the supplemental report and order certifying an amended plan of reorganization by the Commission in said Court on April 8, 1940, a substantial change in the economic conditions of the country and consequently in the financial condition of Debtor's estate, has taken place. A copy of the balance sheet and operating statement as certified by the Clerk of the District Court as of October, 1942, is attached hereto as "Appendix A." A copy of statement over the Certificate of Comptroller for the Trustee of Debtor's estate showing cash position, income available for fixed charges before income taxes is attached hereto as "Appendix B." A comparison of the balance sheets of the Debtor as of June 28, 1935, the date of bankruptcy; as of December 31, 1938, the effective date of the plan being January 1, 1939; as of February 29, 1940, the last balance sheet prior to the filing of the supplemental report and order of the Commission containing the plan of reorganization, approved by the District Court on October 12, 1940; and as of October 31, 1942, the latest balance sheet available, is contained in "Appendix C" hereto.

Before calling attention to the change in the financial condition of the Debtor, we cite decisions of this Court which show that it is eminently proper for the Court to consider and take judicial notice of important changes in conditions which have occurred during the progress of the proceedings.

In *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248, 76 L. ed. 273, this Court set aside an order of the Interstate Commerce Commission which had refused rehearings to establish of record, changes in economic conditions subsequent to the date of closing of the record before the Commission. In that case the record had closed in September, 1928, and this Court held that such a record "cannot be regarded as representative of the conditions existing in 1931." The argument on behalf of the Commission stated that its determination had been reached after regularly conducted and protracted hearings and that a reopening would have meant further lengthy proceedings. This Court said (U. S. 261, 2):

> "These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions. This is not the usual case of possible fluctuating conditions but of a changed economic level. And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice."

So we say that where, as here, a most substantial change in operating conditions has come about, the case should be decided upon the conditions now existing, especially since the proceedings are so important from the standpoint of public interest and the vast extent of property rights affected.

The case just discussed has been cited with approval in a number of cases. We call attention to the following:

In *Los Angeles G. & E. Corp.* v. *Railroad Com.,* 289 U. S. 287, 311-312, 333, 77 L. ed. 1180, the decree appealed from was vacated and the case remanded for compliance with Rule 70½, the District Court being required to refer the case to a special master, on the strength of the *Atchison, T. & S. F. R. Co.,* case, *supra.*

In *Central Ky. Nat. G. Co.* v. *Railroad Commission,* 290 U. S. 264, 78 L. ed. 307, this Court cited with approval its decision in *Atchison, T. & S. F. R. Co.* v. *United States, supra,* reversed the decree, and remanded the case without prejudice to the right and power of the Commission to fix a just and reasonable rate, but made no adjudication of the validity of the rate fixed by the Commission, as affected by changed conditions after February 25, 1927, the effective date of appellant's franchise. The District Court had considered itself restricted to findings as of December 26, 1926, and as this Court pointed out (U. S. 274):

> "That restriction also necessarily excluded from consideration the profound changes in values, costs of service, consumption of commodities and reasonable return on invested capital which we judicially know took place during the period of more than five years while the case was pending before the Commission and the court."

See also *Home Building & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 447, 78 L. ed. 413, where this Court cited with approval *Atchison, T. & S. F. R. Co.* v. *United States, supra,* and discussed with great clarity the nature of equity power of the courts. And see *Dayton P. & L. Co.* v. *Public Utilities Commission,* 292 U. S. 290, 311, 78 L. ed. 1267, wherein again this Court cites with approval the *Atchison, T. & S. F. Ry. Co.* case, *supra,* reaffirming the right and duty of the Court to take notice of business conditions.

The foregoing decisions establish the right of the petitioner to have filed in this Court as a part of the record indisputable evidence taken from the files of the District Court and certified to by the Clerk of that Court, filed by the Trustee of the Debtor's property in accordance with an order of such Court, which clearly establishes the financial condition of the Debtor as of October 31, 1942.

The hearing upon which the Interstate Commerce Commission devised and certified the plan of reorganization, later approved and confirmed by the Court, closed April 23, 1938 (Tr. 3395), long prior to the decision promulgating the supplemental report and order on April 2, 1940. But assuming that the Commission took judicial notice of the reports of the Trustee of Debtor's estate, filed monthly with it, it is clear that the balance sheet as of February 29, 1940, is the most recent which the Commission could have considered in determining its plan of reorganization. It cannot be doubted that none of the improvements in the financial condition subsequent to February 29, 1940, was considered by the Commission in any respect in connection with the determination of the plan of reorganization of the Debtor.

There is now ample cash on hand to pay off the indebtedness to the Reconstruction Finance Corporation as appears on Appendix A, Appendix B and Appendix C, hereto attached. The assets of the Debtor on October 31, 1942, were greater by $53,361,041 than on February 29, 1940, at which time the Commission fixed the maximum capitalization of the reorganized company at $449,974,309. Of this increase in total assets, $47,458,147.44 is an increase in current assets, the latter item representing cash or the equivalent of cash. Total assets of the Debtor on February 29, 1940, were $685,532,492.89 and on October 31, 1942, were $738,893,534.23. One of Debtor's objections to the plan of reorganization is that the maximum capitalization fixed by the Commission is too low. (Tr. 4000) It follows that the maximum capitalization provided for in the plan of reorganization should be increased at least by the increase in assets of $53,361,041.

Inasmuch as disposition of the petition for writs of certiorari in the instant matter may be controlled by the

judgment of this Court in two matters now awaiting decision, namely, that involving the reorganization of the Western Pacific Railroad Company, Docket Nos. 7, 8, 20, 33 and 61, and that of the Chicago, M., St. P. & P. R. Co., Docket Nos. 11-19, 32, suggestion is respectfully made to this Court that, in the event it should conclude that the judgment of the Circuit Court of Appeals should be affirmed by this Court without argument, the order of this court expressly state that such action is taken without prejudice to the presentation to the District Court of a petition for an order directing the Trustee of Debtor's estate to pay the principal and interest of the claim of the Reconstruction Finance Corporation. In support of that suggestion we show as follows:

As of October 31, 1942, with interest computed at 4 per cent during the period of Trusteeship, the total amount due Reconstruction Finance Corporation from the Debtor is $48,178,750.87. (See Appendix B) The plan of reorganization of the Debtor allotted to Reconstruction Finance Corporation, in full settlement of its claim, (1) the following securities of the new company outright (Tr. 3677):

Fifteen-year secured notes	$25,000,000
First and general mortgage bonds, Series A	7,783,180
Second mortgage convertible income bonds, Series A, 4½ per cent	12,114,530
Preferred stock, Series A, 5 per cent	15,543,462
Common stock, no par (stated at $100 a share)	23,259,836
Total	$83,701,008

(2) the following securities were given unconditionally to the Reconstruction Finance Corporation (Tr. 3610):

Union Pacific Railway Company preferred stock, par value	$ 2,085,000
New York Central Railroad Company 4 per cent bonds, 1998	64,000
New York Central & Hudson River Railroad Company 4½ per cent bonds, 2013	100,000
Total	$ 2,249,000

(3) the following securities of the new company were given as collateral to secure the $25,000,000 of 15-year notes (Tr. 3609-3610):

Chicago and North Western Company equipment trust 4½ per cent, Series Y certificates	$ 104,000
Chicago, St. Paul, Minneapolis & Omaha Railway Company first mortgage Series A 5 per cent, due 2000	45,186,000
Chicago, St. Paul, Minneapolis & Omaha Railway Company equipment trust 4¾ per cent Series I certificates	128,000
Indiana Harbor Belt Railroad Company capital stock	1,520,000
Sioux City Bridge Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	945,800
Superior Coal Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	2,000,000
Total	$49,883,800

The grand total of securities of the new company and of the Union Pacific and New York Central to be delivered to Reconstruction Finance Corporation is $135,833,808.

If the claim of the Reconstruction Finance Corporation be paid off in full, all securities in the total of $135,833,808 allocated to said corporation would be released and available for creditors and stockholders whose claims were not provided for in the plan of reorganization. The Commission's plan of reorganization fails to provide in full for the claims of holders of 20-year convertible bonds of 1949, the unsatisfied portion thereof approximating $40,790,912; made no provision for the holders of the preferred stock of the Debtor company of a par value of $22,395,000; and no provision for holders of common stock of the Debtor company outstanding of the par value of $158,440,330.

The maximum capitalization provided for the new company under the plan of reorganization is $449,974,309, which amount petitioner asserts is entirely too low, having in mind the value of Debtor's property. If the claim of the Reconstruction Finance Corporation be paid in full,

the securities allocated to that creditor are sufficient, within the maximum capitalization authorized in the plan of reorganization, to provide for discharge of the claim of convertible bonds of 1949 in full and a substantial allotment to the holders of preferred and common stock of the Debtor.

As appears from the balance sheet attached hereto (Appendix A) as of October 31, 1942, there was on hand in possession of the Trustee, cash, temporary cash investments, and special deposits in the total sum of $56,074,682. The following table is a statement of the current asset account on the balance sheet hereto attached, as of October 31, 1942:

(708)	Cash		$37,456,382
(709)	Temporary cash investments		10,776,181
(711)	Special deposits		7,842,118
	Total		$56,074,681
(712)	Loans and bills receivable	$ 900	
(714)	Net balance receivable from agents and conductors (cash in transit, etc.)	3,407,086	
(715)	Miscellaneous accounts receivable (including large government freight and passenger accounts)	6,149,843	
(716)	Material and supplies on hand	10,090,898	
(717)	Interest and dividends receivable	63,811	
(719)	Other current assets	204,467	19,917,005
	TOTAL CURRENT ASSETS		$75,991,687

It is clear from the foregoing that the Trustee of Debtor's estate has ample funds on hand as of October 31, 1942, to pay off the indebtedness to the Reconstruction Finance Corporation and still have ample working capital to maintain the property of the Debtor now in control of the Trustee. Moreover, Appendix B shows that on November 30, 1942, cash, temporary investments and special deposits aggregated $59,575,918 and Debtor's Comptroller estimates that these items as of December

31, 1942, will exceed $60,000,000 (Appendix B), approximately $4,000,000 greater than on October 31, 1942, thus bettering the position of the Debtor in that amount from that shown in the balance sheet of October 31, 1942. That estimate of cash as of December 31, 1942, assumes that there will be a normal conversion of cash in the book accounts between October 31 and December 31, 1942.

Cash in bank draws little, if any, interest; the debt to the Reconstruction Finance Corporation bears interest at 5 per cent on some notes and 6 per cent on other notes, and in any event bears an interest rate of at least 4 per cent. It is in the interest of Debtor's estate that cash be used to pay off this debt at the earliest possible date. The saving in interest alone approximates $1,700,000 annually.

In the 55th Annual Report of the Interstate Commerce Commission to the Congress dated November 1, 1941, page 2, the Interstate Commerce Commission pointed out the wisdom of reduction of indebtedness "in the present tide of apparently revived earning power." Payment in the instant case of the debt to the Reconstruction Finance Corporation would be in furtherance of the "sane and sound policy" as expressed by the Commission.

During the proceedings before the District Court involving approval of the plan of reorganization, the Trustee of Debtor's estate urged that the claim of the Reconstruction Finance Corporation should bear interest at 4 per cent instead of 5 per cent on some notes and 6 per cent on others. (Tr. 4936-47)

The record contains (Tr. 4943-45) a memorandum of the action of the directors of the Reconstruction Finance Corporation that

"upon final confirmation of the plan of reorganiza-

> tion contained in the report and order of the Interstate Commerce Commission dated December 12, 1939, as supplemented by report and order dated April 2, 1940, Finance Docket No. 10881, this Corporation will, upon request of the reorganization managers for Chicago and North Western Railway Company or of the reorganized Chicago and North Western Railway Company, duly execute and deliver an agreement in the enclosed form."

That agreement (Tr. 4944) provides that the Reconstruction Finance Corporation will surrender to the reorganized company, or upon the request of that company, to the nominee thereof, all of the securities which the Interstate Commerce Commission had allocated to Reconstruction Finance Corporation, which the Reconstruction Finance Corporation may have at such time as there is tendered and paid to the Reconstruction Finance Corporation a sum of money equivalent to the amount of the indebtedness as of June 28, 1935, and interest thereafter at 4 per cent per annum, (1) less such dividends, interest and other payments as may have been received between June 28, 1935, and January 1, 1939, by Reconstruction Finance Corporation on account of the collateral pledged with Reconstruction Finance Corporation by Chicago and North Western Railway Company to secure such indebtedness; (2) less the net proceeds, if any, of the liquidation of the new securities and such of the old securities as shall have been sold prior to the date of tender and payment, plus dividends and interest received by Reconstruction Finance Corporation on both the new securities and the old securities from January 1, 1939, to the date of tender; and (3) less the principal amount at the date of tender and payment of the new secured notes due January 1, 1954, plus interest and principal payments received by Reconstruction Finance Corporation to date of tender and payment. The Reconstruction Finance Corporation

declined to enter into any agreement that none of those securities would be sold. (Tr. 4946)

Thus we have of record an expression of willingness on the part of the Reconstruction Finance Corporation to accept the principal amount of its claim with interest at 4 per cent during the period of Trusteeship, provided that the reorganized company or its nominee purchases the Reconstruction Finance Corporation holdings.

Attached as Appendix D hereto is a copy of a resolution of the Board of Directors on December 10, 1942, directing the special committee and counsel to take proper action to secure payment of the debt to the Reconstruction Finance Corporation. The Debtor submits that it should have the right, since its Trustee now has the cash available, immediately to pay the principal and accrued interest in the amount stated in the offer of the Reconstruction Finance Corporation above referred to and thus give to the creditors and stockholders of the Debtor the benefit which will result from the retirement of this debt. By reference to the reports of the Interstate Commerce Commission authorizing the loans from the Reconstruction Finance Corporation to the Debtor, it will be noted that the funds so secured were intended for support to the capital structure of the Debtor, thus improving the security of other creditors.

The loans by Reconstruction Finance Corporation to the Debtor were made for the purposes stated in Interstate Commerce Commission reports as follows: to pay interest and equipment-trust maturities, $7,600,000, 180 I. C. C. 533, 534; to repay bank loans, to pay fixed interest charges, to pay equipment-trust principal, and to pay equipment-trust notes, $12,461,350, 187 I. C. C. 494, 495; for purchase and treatment of ties, $1,000,000, 187 I. C. C.

692; to pay interest and equipment-trust maturities, and to pay one-half of amount of a maturing issue of debentures, $11,127,000, 189 I. C. C. 405, 406; to pay at maturity one-half the principal of bonds which were first lien on 1226 miles of road, $3,862,000, 193 I. C. C. 370, 371; to pay maturing equipment-trust certificates or to replenish working capital after such payment, and to pay bond interest, $7,357,000, 202 I. C. C. 267, 268; to pay unpaid vouchers, to pay taxes and to pay interest, $4,138,000, 202 I. C. C. 347, 348. Of the total amount of loans approved by the Commission, of $47,546,050, the sums advanced by Reconstruction Finance Corporation amounted to $46,588,133 as of December 31, 1934; the railroad company repaid $3,538,000 leaving $43,050,133 as of February 1, 1935. Of that outstanding sum as of that date, $27,302,933 was carried in current liabilities account and the remainder as funded debt, 207 I. C. C. 123, 124.

We submit the funds secured by loans were used to strengthen the security back of creditors' claims and the payment of these loans at the present time would not violate the applicable law in any respect.

As showing that Debtor's estate will not be injured by using its cash to pay off this debt we call attention to the fact that, as appears from the certificate of the Comptroller, the Debtor had income available for fixed charges, but before income taxes for the ten months ending October 31, 1942, of $28,209,772; also, the Comptroller estimates that for the calendar year 1942 the income available for fixed charges, but before income taxes, will approximate $32,200,000.

The plan of reorganization has not yet become effective. Should this Court deny writs of certiorari herein, and fail to require payment of the debt due the Reconstruc-

tion Finance Corporation, the Debtor corporation desires to present to the District Court a petition for an order directing the Trustee to pay the claim of the Reconstruction Finance Corporation in full and to remand the proceedings to the Interstate Commerce Commission for modification of the plan of reorganization to give effect to the payment of the claim of the Reconstruction Finance Corporation. Prayer is therefore made that, should the petition for writs of certiorari be denied, the mandate of this Court will definitely provide that such action is taken without prejudice to the exercise of equitable jurisdiction of the District Court in accordance with Section 77. Such a proviso is necessary to dispel any doubt that the District Court might otherwise have that it is not within its jurisdiction to entertain such petition.

For the reasons herein stated, this Court should grant this motion to supplement the record herein by receipt of the certified copy of the statement of liabilities and assets of the Debtor, North Western Railway Company, as of October 31, 1942, and the summary of revenues and expenses for said Debtor for the month of October, 1942; and the memorandum of C. H. Westbrook, Comptroller for the Debtor's estate, dated December 15, 1942, showing cash assets of Debtor's estate as of October 31, 1942, and November 30, 1942, income available for fixed charges before income taxes and amount of indebtedness of Debtor to Reconstruction Finance Corporation as of October 31, 1942.

Petitioner in no respect qualifies its petition and prayer for writs of certiorari dated March 4, 1942, but urges that such writs issue and that the case be heard on brief and oral argument as provided by the rules of this Court.

Copies of this motion, with supporting brief and ap-

pendices, have been served on all parties to these proceedings.

Respectfully submitted,

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor, Petitioner.

Dated at Chicago, Illinois, this 17th day of December, 1942.

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

In Proceedings for the Reorganization of a Railroad.

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Debtor.* } No. 60448.

Statement of Assets and Liabilities of Debtor as of October 31, 1942 and Summary of Revenues and Expenses of Debtor for the Month of October, 1942.

TO THE CLERK OF SAID COURT:

Pursuant to Section 7 of Order No. 1, entered herein on June 28, 1935, I submit herewith a statement of the assets and liabilities of the Debtor as of October 31, 1942, together with a statement showing revenues and expenses of the Debtor for the month of October, 1942. Said statements are certified as correct by the chief accounting officer of the Debtor.

CHARLES M. THOMSON,
Trustee of the property of Chicago and North Western Railway Company.

Dated: December 7, 1942.
Filed: December 8, 1942.

	ASSETS.	Prior	Current
INVESTMENTS:			
(701)	Road and Equipment Property	$544,599,199.48	Cr. $6,754,115.45
(702)	Improvements on Leased Property	376,868.91	Cr. 41,616.68
(704)	Deposits in Lieu of Mortgaged Property Sold	.....	152,643.33
(705)	Miscellaneous Physical Property	13,513,931.88	23,619.37
(706)	Investment in Affiliated Companies—		
	Stocks	27,244,538.67	60,000.00
	Bonds	46,260,061.55	.....
	Advances	664,067.07	380,229.04
(707)	Other Investments—		
	Stocks	3,910,575.93	220.00
	Bonds	151,770.00	.....
	Miscellaneous	.....	12,191.47
		$636,721,013.49	Cr. $6,166,828.92
CURRENT ASSETS:			
(708)	Cash	.....	37,456,382.51
(709)	Temporary Cash Investments	.....	10,776,181.25
(711)	Special Deposits	4,000.00	7,838,118.62
(712)	Loans and Bills Receivable	.....	900.00
(714)	Net Balance Receiv. from Agents & Conductors	.....	3,407,086.06
(715)	Miscellaneous Accounts Receivable	1,944.09	6,147,899.02
(716)	Material and Supplies	.....	10,090,897.90
(717)	Interest and Dividends Receivable	.....	63,810.96
(719)	Other Current Assets	Cr. 88.35	204,555.47
		$ 5,855.74	$ 75,985,831.79
DEFERRED ASSETS:			
(720)	Working Fund Advances	.....	27,367.07
(722)	Current Account—Assets—June 30, 1935, Collected (See Contra)	33,086,955.88	.....
(722)	Prior Account—Liabilities—June 30, 1935, Paid (See Contra)	.....	75,647,205.40
(722)	Other Deferred Assets	12,956,748.18	17,791,749.77
		$ 46,043,704.06	$ 93,466,322.24
UNADJUSTED DEBITS:			
(723)	Rents and Insurance Premiums Paid in Advance	.....	95,855.31
(727)	Other Unadjusted Debits	47,542.44	1,428,399.36
		$ 47,542.44	$ 1,524,254.67
	Par Value of Holdings		
(728)	Securities Issued or Assumed by Respondent—Unpledged $9,106,000.00		
(729)	Securities Issued or Assumed by Respondent—Pledged 83,555,000.00		
	$92,661,000.00	$682,818,115.73	$164,809,579.78

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
CHARLES M. THOMSON, TRUSTEE
BALANCE SHEET—OCTOBER 31, 1942

	Prior	Current	Total
.....	$544,599,199.48	Cr. $6,754,115.45	$537,845,084.03
.....	376,868.91	Cr. 41,616.68	335,252.23
ld....	.....	152,643.33	152,643.33
.....	13,513,931.88	23,619.37	13,537,551.25
.....	27,244,538.67	60,000.00	27,304,538.67
.....	46,260,061.55	.....	46,260,061.55
.....	664,067.07	380,229.04	1,044,296.11
.....	3,910,575.93	220.00	3,910,795.93
.....	151,770.00	.....	151,770.00
.....	.....	12,191.47	12,191.47
	$636,721,013.49	Cr. $6,166,828.92	$630,554,184.57
.....	.....	37,456,382.51	37,456,382.51
.....	.....	10,776,181.25	10,776,181.25
.....	4,000.00	7,838,118.62	7,842,118.62
.....	.....	900.00	900.00
tors..	.....	3,407,086.06	3,407,086.06
.....	1,944.09	6,147,899.02	6,149,843.11
.....	.....	10,090,897.90	10,090,897.90
.....	.....	63,810.96	63,810.96
.....	Cr. 88.35	204,555.47	204,467.12
	$ 5,855.74	$ 75,985,831.79	$ 75,991,687.53
.....	.....	27,367.07	27,367.07
.....	33,086,955.88	.....	.....
.....	.....	75,647,205.40	.....
.....	12,956,748.18	17,791,749.77	30,748,497.95
	$ 46,043,704.06	$ 93,466,322.24	$ 30,775,865.02
vance	.....	95,855.31	95,855.31
.....	47,542.44	1,428,399.36	1,475,941.80
	$ 47,542.44	$ 1,524,254.67	$ 1,571,797.11
ldings			
000.00			
000.00			
000.00	$682,818,115.73	$164,809,579.78	$738,893,534.23

LIABILITIES.	Prior	Current	Total
STOCK:			
(751) Capital Stock	$180,835,300.00	.....	$180,835,300.00
Scrip	4,545.25	.....	4,545.25
(753) Premium on Capital Stock	29,657.75	.....	29,657.75
	$180,869,503.00	.....	$ 180,869,503.00
GOVERNMENTAL GRANTS:			
(754) Grants in Aid of Construction	$ 463,116.49	$ 2,486,910.32	$ 2,950,026.81
LONG TERM DEBT:			
(755) Funded Debt Unmatured $373,391,000.00			
Less Respondent's Holdings 92,596,000.00	$280,795,000.00	.....	$280,795,000.00
(755½) Long Term Debt in Default	$ 71,724,262.71	.....	$ 71,724,262.71
(756) Receivers' and Trustees' Securities $20,018,000.00			
Less Respondent's Holdings 65,000.00	$ 1,781,000.00	$ 18,172,000.00	$ 19,953,000.00
CURRENT LIABILITIES:			
(759) Traffic and Car Service Balances—Cr.	Dr. 113.00	4,172,893.97	4,172,780.97
(760) Audited Accounts and Wages Payable	5,738.36	5,560,439.24	5,566,177.60
(761) Miscellaneous Accounts Payable	6.02	187,734.76	187,740.78
(762) Interest Matured Unpaid	16,128.75	7,440.00	23,568.75
(763) Dividends Matured Unpaid	62,055.70	.....	62,055.70
(764) Unmatured Interest Accrued	1,230,650.00	103,542.89	1,334,192.89
(767) Accrued Tax Liability	79,278.58	4,520,929.75	4,600,208.33
(768) Other Current Liabilities	5,000.00	3,726,934.00	3,731,934.00
	$ 1,398,744.41	$ 18,279,914.61	$ 19,678,659.02
DEFERRED LIABILITIES:			
(769½) Matured Interest in Default	98,925,922.35	.....	98,925,922.35
(770) Current Account Liabilities—June 30, 1935, Paid (See Contra)	75,647,205.40	.....	.....
(770) Prior Account—Assets—June 30, 1935, Collected (See Contra)	.....	33,086,955.88	.....
(770) Other Deferred Liabilities	66,471.75	1,747,671.22	1,814,142.97
	$174,639,599.50	$ 34,834,627.10	$100,740,065.32
UNADJUSTED CREDITS:			
(772) Premium on Funded Debt	377,644.46	21,950.67	399,595.13
(773½) Equalization Reserves	.....	Dr. 69,562.44	Dr. 69,562.44
(775) Accrued Depreciation—Road	.....	2,221,650.81	2,221,650.81
(776) Accrued Depreciation—Equipment	62,843,454.35	11,966,878.61	74,810,332.96
(776½) Accrued Amortization of Defense Projects—Equipment	.....	474,347.14	474,347.14
(778) Other Unadjusted Credits	3,102,927.44	28,013,862.22	31,116,789.66
	$ 66,324,026.25	$ 42,629,127.01	$108,953,153.26
CORPORATE SURPLUS:			
(779) Additions to Property through Income and Surplus	3,222,501.26	Dr. 32,270.01	3,190,231.25
(784) Profit and Loss	Dr. 98,399,637.89	48,439,270.75	Dr. 49,960,367.14
	Dr. $95,177,136 63	$ 48,407,000.74	Dr. $46,770,135.89
	$682,818,115.73	$164,809,579.78	$738,893,534.23

CHICAGO AND NORTH WESTI

CHARLES M. THOM

INCOME ACCOUNT—MONT

I. OPERATING INCOME

Railway Operating Income:

Operating Revenues—

- Freight .....
- Passenger .....
- Mail .....
- Express .....
- Miscellaneous .....
- Incidental .....
- Joint Facility—net .....

Total Operating Revenues.....

Operating Expenses—

- Maintenance of Way and Structures.....
- Maintenance of Equipment.....
- Traffic .....
- Transportation .....
- Miscellaneous .....
- General .....

Total Operating Expenses.....

NET REVENUE FROM RAILWAY OPERATIONS

Railway Tax Accruals.....

RAILWAY OPERATING INCOME.....

Rent Income:

- Rent from Locomotives.....
- Rent from Passenger-train Cars.....
- Rent from Work Equipment.....
- Joint Facility Rent Income.....

Total Rent Income.....

Rents Payable:

- Hire of Freight Cars—Debit Balance.....
- Rent for Locomotives.....
- Rent for Passenger-train Cars.....
- Joint Facility Rents.....

Total Rents Payable.....

NET RENTS .....

NET RAILWAY OPERATING INCOME.....

ERN RAILWAY COMPANY

SON, TRUSTEE

H OF OCTOBER, 1942

	Prior	Current	Total
	$ 142.30	$10,758,690.75	$10,758,833.05
	.....	2,001,680.54	2,001,680.54
	.....	212,946.94	212,946.94
	.....	343,220.72	343,220.72
	.....	428,011.30	428,011.30
Dr.	6.75	368,227.46	368,220.71
	.....	Dr. 200,114.32	Dr. 200,114.32
	$ 135.55	$13,912,663.39	$13,912,798.94
	$ 430.75	$ 1,898,876.73	$ 1,899,307.48
	26.66	2,009,410.98	2,009,437.64
	.....	199,643.62	199,643.62
	26.67	4,066,310.02	4,066,336.69
	.....	112,291.06	112,291.06
	.....	305,586.35	305,586.35
	$ 484.08	$ 8,592,118.76	$ 8,592,602.84
Def.	$ 348.53	$ 5,320,544.63	$ 5,320,196.10
	.....	1,690,446.41	1,690,446.41
Def.	$ 348.53	$ 3,630,098.22	$ 3,629,749.69
	.....	7,785.21	7,785.21
	.....	37,848.95	37,848.95
	.....	1,098.62	1,098.62
	.....	40,352.90	40,352.90
	.....	$ 87,085.68	$ 87,085.68
	.....	229,379.48	229,379.48
	.....	4,298.51	4,298.51
	.....	7,688.30	7,688.30
Cr.	194.48	47,917.80	47,723.32
Cr.	194.48	$ 289,284.09	$ 289,089.61
Cr.	$ 194.48	$ 202,198.41	$ 202,003.93
Def.	$ 154.05	$ 3,427,899.81	$ 3,427,745.76

(714)	Net Balance Receiv. from Agents & Conductors..	.....	3,407,086.06
(715)	Miscellaneous Accounts Receivable.....	1,944.09	6,147,899.02
(716)	Material and Supplies.....	.....	10,090,897.90
(717)	Interest and Dividends Receivable.....	.....	63,810.96
(719)	Other Current Assets.....	Cr. 88.35	204,555.47
		$ 5,855.74	$ 75,985,831.79
DEFERRED ASSETS:			
(720)	Working Fund Advances.....	.....	27,367.07
(722)	Current Account—Assets—June 30, 1935, Collected (See Contra).....	33,086,955.88	.....
(722)	Prior Account—Liabilities—June 30, 1935, Paid (See Contra)	.....	75,647,205.40
(722)	Other Deferred Assets.....	12,956,748.18	17,791,749.77
		$ 46,043,704.06	$ 93,466,322.24
UNADJUSTED DEBITS:			
(723)	Rents and Insurance Premiums Paid in Advance	.....	95,855.31
(727)	Other Unadjusted Debits.....	47,542.44	1,428,399.36
		$ 47,542.44	$ 1,524,254.67

		Par Value of Holdings		
(728)	Securities Issued or Assumed by Respondent—Unpledged	$9,106,000.00		
(729)	Securities Issued or Assumed by Respondent—Pledged	83,555,000.00		
		$92,661,000.00	$682,818,115.73	$164,809,579.78

NOTE: The following payments for redemption of debt and interest have been made since June 28, 1935:

	Cash Payments	
	Month of Oct., 1942	Period June 28, 1 to Oct. 31,
Redemption of Debt:		
Equipment Trust Certificates.....	$174,000.00	$20,425,000
Bonds	.....	26,500
R.F.C. (P.W.A. and Tie) Loans.....	.....	2,160,000
Railroad Credit Corporation.....	.....	300,000
Bank Loans	.....	659,199
	$174,000.00	$23,570,699
Payment of Interest:		
Equipment Trust Certificates.....	$ 31,925.00	$ 3,973,593
Bonds	50,064.40	13,685,345
R.F.C. (P.W.A. and Tie) Loans.....	.....	295,315
R.F.C. (Other) Loans.....	.....	3,767,755
Railroad Credit Corporation.....	.....	1,751
Bank Loans	.....	395,520
	$ 81,989.40	$22,119,280
	$255,989.40	$45,689,979

December 3, 1942.

.....	.....	900.00	900.00
Conductors..	.....	3,407,086.06	3,407,086.06
.....	1,944.09	6,147,899.02	6,149,843.11
.....	.....	10,090,897.90	10,090,897.90
.....	.....	63,810.96	63,810.96
.....	Cr. 88.35	204,555.47	204,467.12
	$ 5,855.74	$ 75,985,831.79	$ 75,991,687.53
.....	.....	27,367.07	27,367.07
1935,			
.....	33,086,955.88	.....	.....
), 1935,			
.....	.....	75,647,205.40	.....
.....	12,956,748.18	17,791,749.77	30,748,497.95
	$ 46,043,704.06	$ 93,466,322.24	$ 30,775,865.02
d in Advance	.....	95,855.31	95,855.31
.....	47,542.44	1,428,399.36	1,475,941.80
	$ 47,542.44	$ 1,524,254.67	$ 1,571,797.11

e of Holdings			
$9,106,000.00			
83,555,000.00			
$92,661,000.00	$682,818,115.73	$164,809,579.78	$738,893,534.23

(760) Audited Accounts and Wages Payable.....	5,738.36	5,560,439.24	5,566,177.60
(761) Miscellaneous Accounts Payable.....	6.02	187,734.76	187,740.78
(762) Interest Matured Unpaid.....	16,128.75	7,440.00	23,568.75
(763) Dividends Matured Unpaid.....	62,055.70	.....	62,055.70
(764) Unmatured Interest Accrued.....	1,230,650.00	103,542.89	1,334,192.89
(767) Accrued Tax Liability.....	79,278.58	4,520,929.75	4,600,208.33
(768) Other Current Liabilities.....	5,000.00	3,726,934.00	3,731,934.00
	$ 1,398,744.41	$ 18,279,914.61	$ 19,678,659.02
DEFERRED LIABILITIES:			
(769½) Matured Interest in Default.....	98,925,922.35	.....	98,925,922.35
(770) Current Account Liabilities—June 30, 1935, Paid (See Contra).....	75,647,205.40	.....	.....
(770) Prior Account—Assets—June 30, 1935, Collected (See Contra).....	.....	33,086,955.88	.....
(770) Other Deferred Liabilities.....	66,471.75	1,747,671.22	1,814,142.97
	$174,639,599.50	$ 34,834,627.10	$100,740,065.32
UNADJUSTED CREDITS:			
(772) Premium on Funded Debt.....	377,644.46	21,950.67	399,595.13
(773½) Equalization Reserves	.....	Dr. 69,562.44	Dr. 69,562.44
(775) Accrued Depreciation—Road	.....	2,221,650.81	2,221,650.81
(776) Accrued Depreciation—Equipment	62,843,454.35	11,966,878.61	74,810,332.96
(776½) Accrued Amortization of Defense Projects—Equipment	.....	474,347.14	474,347.14
(778) Other Unadjusted Credits.....	3,102,927.44	28,013,862.22	31,116,789.66
	$ 66,324,026.25	$ 42,629,127.01	$108,953,153.26
CORPORATE SURPLUS:			
(779) Additions to Property through Income and Surplus	3,222,501.26	Dr. 32,270.01	3,190,231.25
(784) Profit and Loss.....	Dr. 98,399,637.89	48,439,270.75	Dr. 49,960,367.14
	Dr. $95,177,136 63	$ 48,407,000.74	Dr. $46,770,135.89
	$682,818,115.73	$164,809,579.78	$738,893,534.23

payments for redemption
st have been made since

	Cash Payments		By application of Collateral Income	
	Month of Oct., 1942	Period June 28, 1935 to Oct. 31, 1942	Month of Oct., 1942	Period June 28, 1935 to Oct. 31, 1942
Certificates.....	$174,000.00	$20,425,000.00	.....	.....
.....	.....	26,500.00	.....	.....
Tie) Loans.....	.....	2,160,000.00	.....	.....
poration.....	.....	300,000.00	.....	$1,110,881.96
.....	.....	659,199.00	.....	.....
	$174,000.00	$23,570,699.00	.....	$1,110,881.96
ertificates.....	$ 81,925.00	$ 3,973,593.64	.....	.....
.....	50,064.40	13,685,345.65	.....	.....
Tie) Loans.....	.....	295,315.03	.....	$ 1,994.52
ns.....	.....	3,767,755.00	$43,950.00	3,559,837.98
poration.....	.....	1,751.66	.....	64,173.51
.....	.....	395,520.00	41,700.00	625,500.00
	$ 81,989.40	$22,119,280.98	$85,650.00	$4,251,506.01
	$255,989.40	$45,689,979.98	$85,650.00	$5,362,387.97

Correct:

C. H. WESTBROOK
Comptroller.

II. OTHER INCOME

Miscellaneous Rent Income.....
Miscellaneous Nonoperating Physical Property.....
Dividend Income .....
Income from Funded Securities.....
Income from Unfunded Securities and Accounts.....
Release of Premiums on Funded Debt.....

Total Other Income.....

Total Income .....

III. MISCELLANEOUS DEDUCTIONS FROM INCOME

Miscellaneous Rents .....
Miscellaneous Tax Accruals.....
Miscellaneous Income Charges.....

Total Miscellaneous Deductions.....

IV. OTHER DEDUCTIONS—None

INCOME AVAILABLE FOR FIXED CHARGES..

V. FIXED CHARGES

Interest on Funded Debt.....
Interest on Unfunded Debt.....

Total Fixed Charges.....

NET INCOME .....

Dec. 3, 1942.

	.....	53,191.47	53,191.47
	.....	25,465.95	25,465.95
	.....	83,430.00	83,430.00
	.....	21,435.33	21,435.33
	.....	12,225.45	12,225.45
	730.31	383.79	1,114.10
	$ 730.31	$ 196,131.99	$ 196,862.30
	$ 576.26	$ 3,624,931.80	$ 3,624,608.06
	.....	187.10	187.10
	.....	13,100.00	13,100.00
	.....	645.19	645.19
	.....	$ 13,932.29	$ 13,932.29
	$ 576.26	$ 3,610,099.51	$ 3,610,675.77
	1,327,064.61	40,737.45	1,367,802.06
	.....	3,797.97	3,797.97
	$1,327,064.61	$ 44,535.42	$ 1,371,600.03
Def.	$1,326,488.35	$ 3,565,564.09	$ 2,239,075.74

Correct:

C. H. WESTBROOK

Comptroller.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION. } ss.

C. H. WESTBROOK, first upon oath being duly sworn, says that he is the chief accounting officer, to-wit, Comptroller of Chicago and North Western Railway Company, Debtor herein; that the attached and foregoing statement of assets and liabilities of the Debtor as of October 31, 1942, and the statement showing revenues and expenses of the Debtor for the month of October, 1942, are true and correct as shown by the books and accounts of said Debtor.

C. H. WESTBROOK.

Subscribed and sworn to before me this 7th day of December, 1942.

P. J. SESTERHENN,
Notary Public.

(Seal)

My Commission Expires May 6, 1946.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss:

I, ROY H. JOHNSON, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Statement of Assets and Liabilities of Debtor as of October 31, 1942 and Summary of Revenues and Expenses of Debtor for the Month of October, 1942, filed December 8, 1942, In the Matter of Chicago and North Western Railway Company, Debtor, No. 60448, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court [SEAL.] at Chicago, this 9th day of December, A. D. 1942.

ROY H. JOHNSON,
Clerk,
By DANIEL MCLEAN, JR.,
Deputy Clerk.

APPENDIX B.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
Charles M. Thomson, Trustee

	October 31, 1942	November 30, 1942	December 31, 1942 (Est'd)
I. Cash	$37,456,382	$35,033,191	$52,508,000
Temporary cash investments	10,776,181	17,771,855	
Special deposits*	7,842,119	6,770,872	7,500,000
Total	$56,074,682	$59,575,918	$60,008,000

* Includes, as of October 31, 1942, $5,939,930 balance in possession and control of Equipment Trustees from proceeds of sale of equipment trust notes, and $1,902,189 representing funds set aside for specific obligations.

II. Income available for fixed charges, but before income taxes:

January 1—October 31, 1942, actual	$28,209,772
Year 1942, estimated	$32,200,000

III. Amount due Reconstruction Finance Corporation as of October 31, 1942, with interest calculated at 4%:

$48,178,750.87

I, CHARLES H. WESTBROOK, Comptroller of Chicago and North Western Railway Company, do hereby certify that except for the parts of the foregoing statement marked "Estimated" the figures contained therein are true and correct as shown by the books and records of said trust estate; that the parts marked "Estimated" reflect my own

judgment of the estimated results for the period indicated, actual figures for a portion of said period not being presently available; that those of said figures which are described as "Cash, Temporary Cash Investments and Special Deposits" are gross figures which do not allow for or take into consideration current liabilities, taxes accrued, or other claims upon or against said cash, temporary cash investments and special deposits.

Dated at Chicago, Illinois, this 15th day of December, 1942.

CHARLES H. WESTBROOK.

APPENDIX C, SHEET 1.

ASSETS OF DEBTOR, CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Line No.	Item No.	INVESTMENTS	June 30, 1935 (Tr. 91-92)		December 31, 1938 (Tr. 1139-1141)		February 29, 1940 (Tr. 1468-1470)	
1.	(701)	Investment in Road and Equipment	$557,344,505.22		$541,408,773.11		$538,400,182.20	
2.	(702)	Improvements on Leased Railway Property	163,062.84		386,054.43		390,403.94	
3.	(704)	Deposits in Lieu of Mortgaged Property Sold (Note A)						
4.	(705)	Miscellaneous Physical Property	955,976.12		13,705,566.18		13,616,033.99	
5.	(706)	Investments in Affiliated Companies						
6.		Stocks	27,244,538.67		27,244,538.67		27,244,538.67	
7.		Bonds	46,363,747.66		46,304,498.46		46,289,686.16	
8.		Advances	1,761,658.32		1,100,859.46		1,165,815.96	
9.	(707)	Other Investments						
10.		Stocks	3,910,575.93		3,910,795.93		3,910,795.93	
11.		Bonds	162,270.00		151,770.00		151,770.00	
12.		Miscellaneous	855.00		192.50		177.65	
13.		TOTAL INVESTMENTS	$637,907,189.76		$634,213,048.74		$631,169,404.50	
14.		CURRENT ASSETS						
15.	(708)	Cash	$ 3,559,138.16		$ 7,180,776.45		$ 14,205,427.15	
16.	(709)	Temporary Cash Investments						
17.	(711)	Special Deposits (Note A)	24,000.00		389,940.77		957,649.73	
18.	(712)	Loans and Bills Receivable			4,000.00			
19.	(713)	Traffic and Car Service Balances Receivable (Note B)	275,972.15		315,300.32		330,317.93	
20.	(714)	Net Balance Receivable from Agents and Conductors	1,902,877.67		1,547,232.26		1,711,757.85	
21.	(715)	Miscellaneous Accounts Receivable	7,718,676.24		6,766,191.09		2,345,526.07	
22.	(716)	Material and Supplies	8,838,615.64		9,922,179.50		8,793,915.74	
23.	(717)	Interest and Dividends Receivable (Note C)	66,215.15					
24.	(719)	Other Current Assets	257,201.06		202,767.48		188,945.62	
25.		TOTAL CURRENT ASSETS	$ 22,642,696.07		$ 26,328,387.87		$ 28,533,540.09	
26.		DEFERRED ASSETS						
27.	(720)	Working Fund Advances	$ 34,899.81		$ 34,628.99		$ 28,639.43	
28.	(722)	Other Deferred Assets	8,796,128.14		17,222,908.30		24,759,159.19	
29.		TOTAL DEFERRED ASSETS	$ 8,831,027.95		$ 17,257,537.29		$ 24,787,798.62	
30.		UNADJUSTED DEBITS						
31.	(723)	Rents and Insurance Premiums Paid in Advance	$ 19,458.78		$ 44,125.14		$ 40,858.09	
32.	(727)	Other Unadjusted Debits	1,364,602.78		1,124,772.48		1,000,891.59	
33.		TOTAL UNADJUSTED DEBITS	$ 1,384,061.56		$ 1,168,897.62		$ 1,041,749.68	
34.		PAR VALUE OF HOLDINGS						
35.	(728)	Securities Issued or Assumed by Respondent						
36.		Unpledged	$ 3,048,000.00		$ 3,083,500.00		$ 3,083,500.00	$ 9,106,0
37.	(729)	Securities Issued or Assumed by Respondent						
38.		Pledged	90,654,000.00		89,615,000.00		89,602,000.00	83,555,0
39.			$ 93,702,000.00		$ 92,698,500.00		$ 92,685,500.00	$ 92,661,0
40.		GRAND TOTAL ASSETS		$670,764,975.34		$678,967,871.52		$685,532,492.89

Notes of Important Changes in I. C. C. Classification of Accounts Affecting Above Balance Sheet Comparisons during Period June 30, 1935, to October 31, 1942.

Note A.	(704)	Deposits in lieu of mortgaged property sold.	Included in "711—Special Deposits" prior to 1942.
Note B.	(713)	Traffic and car service balances receivable.	Combined with "759—Traffic and Car Service Balances—Cr."
Note C.	(717)	Interest and dividends receivable.	Interest and dividends not anticipated in 1938 and 1940 but to Income when actually received.

COMPANY

February 29, 1940 (Tr. 1468-1470)		October 31, 1942 (Appendix A)	Increase or Decrease October 31, 1942, over or under February 29, 1940. Decrease	Increase	Line No.
$538,400,182.20		$537,845,084.03	$ 555,098.17		1.
390,403.94		335,252.23	55,051.71		2.
		152,643.33		$ 152,643.33	3.
13,616,033.99		13,537,551.25	78,482.74		4.
					5.
27,244,538.67		27,304,538.67			6.
46,289,686.16		46,260,061.55	No Change		7.
1,165,815.96		1,044,296.11	No Change		8.
			121,519.85		9.
3,910,795.93		3,910,795.93			10.
151,770.00		151,770.00	No Change		11.
177.65		12,191.47	No Change		12.
				12,013.82	
$631,169,404.50		$630,554,184.57	615,219.93		13.
					14.
$ 14,205,427.15		$ 37,456,382.51			15.
		10,776,181.25		23,250,955.36	16.
957,649.73		7,842,118.62		10,776,181.25	17.
		900.00		6,884,468.89	18.
330,317.93			330,317.93	900.00	19.
1,711,757.85		3,407,086.06			20.
2,345,526.07		6,149,843.11		1,695,328.21	21.
8,793,915.74		10,090,897.90		3,803,317.04	22.
		63,810.96		1,296,882.16	23.
188,945.62		204,467.12		63,810.96	24.
				15,521.50	
$ 28,533,540.09		$ 75,991,687.53			25.
				47,458,147.44	
28,639.43		$ 27,367.07			26.
24,759,159.19		30,748,497.95	1,272.33		27.
				5,989,338.76	28.
$ 24,787,798.62		$ 30,775,865.02			
				5,988,066.40	29.
$ 40,858.09		$ 95,855.31			30.
1,000,891.59		1,475,941.80		54,997.22	31.
				475,050.21	32.
$ 1,041,749.68		$ 1,571,797.11			
				530,047.43	33.
	$ 9,106,000.00				34.
					35.
	83,555,000.00				36.
					37.
	$ 92,661,000.00				38.
$685,532,492.89		$738,893,534.23		$53,361,041.34	39. 40.

' prior to 1942.

ar Service Balances—Cr." in 1942.

ited in 1938 and 1940 but credited
ved.

Line No.	Item No.	1. STOCK		LIABILITIES OF DEBTC June 30, 1935 (Tr. 91-92)
1.	(751)	Capital Stock		$180,835,000.00
2.		Scrip		4,845.25
3.	(753)	Premium on Capital Stock		29,657.75
4.		TOTAL STOCK		$180,869,503.00
5.		GOVERNMENTAL GRANTS		
6.	(764)	Grants in Aid of Construction		$ 84,746.24
7.		LONG TERM DEBT		
8.	(755)	Funded Debt Unmatured	$434,984,300.00	
9.		Less Respondent's Holdings	93,702,000.00	$341,282,300.00
10.	(755½)	Long Term in Default (Note D)		
11.	(756)	Receiver's and Trustee's Securities		
12.		Unmatured		
13.		Less Respondent's Holdings		
14.		CURRENT LIABILITIES		
15.	(758)	Loans and Bills Payable		$ 34,235,892.72
16.	(759)	Traffic Car and Service Balances Payable		2,558,417.22
17.	(760)	Audited Accounts and Wages Payable		9,956,890.93
18.	(761)	Miscellaneous Accounts Payable		107,690.09
19.	(762)	Interest Matured Unpaid (Note F)		2,729,418.97
20.	(763)	Dividends Matured Unpaid		62,055.70
21.	(764)	Funded Debt Matured Unpaid (Notes D and E)		63,000.00
22.	(766)	Unmatured Interest Accrued (Note E)		2,964,263.27
23.	(767)	Accrued Tax Liability (Note G)		
24.	(768)	Other Current Liabilities		515,683.87
25.		TOTAL CURRENT LIABILITIES		$ 53,313,317.77
26.		DEFERRED LIABILITIES		
27.	(769½)	Matured Interest in Default (Note F)		
28.	(770)	Other Deferred Liabilities		$ 115,561.03
29.		TOTAL DEFERRED LIABILITIES		$ 115,561.03
30.		UNADJUSTED CREDITS		
31.	(771)	Tax Liability (Note G)		$ 4,911,161.36
32.	(772)	Premium on Funded Debt		459,751.48
33.	(772½)	Equalization Reserve		
34.	(774)	Maintenance Reserves		
35.	(775)	Accrued Depreciation Road		
36.	(776)	Accrued Depreciation—Equipment		52,893,592.84
37.	(776½)	Accrued Amortization of Defense Projects		
38.	(778)	Other Unadjusted Credits		3,584,147.42
39.		TOTAL UNADJUSTED CREDITS		$ 71,848,653.10
40.		CORPORATE SURPLUS		
41.	(779)	Addition to Property through Income & Surplus		$ 3,227,375.63
42.	(784)	Profit and Loss		30,023,618.57
43.		TOTAL CORPORATE SURPLUS		$ 33,250,994.20
44.		GRAND TOTAL LIABILITIES		$670,764,975.34

Notes of Import
Affec
during

Note D. (755½) Long term debt in default.
(764) Funded debt matured unpaid.

Note E. (764) Unmatured interest accrued.
(766)

Note F. (762) Interest matured unpaid.
(769½) Matured interest in default.

Note G. (767) Accrued tax liability.
(771) Tax liability.

APPENDIX C, SHEET 2.

IES OF DEBTOR, CHICAGO AND NORTH WESTERN RAILWAY COMPANY

June 30, 1935 (Tr. 91-92)		December 31, 1938 (Tr. 1139-1141)		February 29, 1940 (Tr. 1468-1470)		October 31, 1942 Appendix A	Increase or Decrease October 31, 1942, as compared with February 29, 1940. Decrease	Increase	
$180,835,000.00		$180,835,300.00		$180,835,300.00		$180,835,300.00	No Change		1.
4,845.25		4,545.25		4,545.25		4,545.25	No Change		2.
29,657.75		29,657.75		29,657.75		29,657.75	No Change		3.
$180,869,503.00		$180,869,503.00		$180,869,503.00		$180,869,503.00	No Change		4.
$ 84,746.24		$ 1,949,347.53		$ 2,779,286.45		$ 2,950,036.81		170,640.36	5. 6.
$341,282,300.00	$330,658,000.00 $2,594,500.00	$333,063,500.00	$330,488,000.00 $2,594,500.00	$287,893,500.00		$280,795,000.00	7,098,500.00		7. 8. 9.
				$ 66,594,699.22		$ 71,734,362.71		$5,139,563.49	10.
	$ 11,783,000 104,000	$ 11,879,000.00	$ 11,353,000.00 $1,000.00	$ 11,162,000.00		$ 19,953,000.00		$8,791,000.00	11. 12.
$ 34,235,892.72		$ 32,885,644.07							13.
3,558,417.22		3,201,750.10		3,943,290.90		$ 4,172,780.97		5,139,563.49	14.
9,956,890.93		3,977,205.80		4,339,259.83		5,566,177.60		224,290.07	15.
107,690.09		309,468.73		219,341.01		187,740.78		1,226,917.77	16.
2,729,418.97		56,252,194.32		71,878.75		33,568.75	$1,600.24		17.
62,055.70		62,055.70		62,055.70		66,310.00	66,310.00		18.
63,000.00		34,070,300.00		62,055.70		62,055.70	No Change		19.
2,984,268.27		3,889,425.29		1,234,192.89		1,234,192.89		1,234,192.89	20.
				8,463,030.42		8,463,030.42			21.
515,683.87		591,076.44		622,634.29		4,600,208.33		4,600,208.33	22.
						5,731,934.00		3,109,309.71	23.
$ 53,313,317.77		$134,239,300.45		$ 12,725,480.90		$ 19,678,859.02		6,953,178.12	24. 25.
$ 115,561.03		$ 749,798.75		$ 72,303,254.51		$ 98,925,922.35		26,722,667.84	26.
				650,975.58		1,814,142.97		1,163,167.39	27.
$ 115,561.03		$ 749,798.75		$ 72,954,230.09		$100,740,065.32		27,885,835.23	28. 29.
$ 4,911,161.36		$ 5,182,938.77		$ 4,656,753.95			4,656,753.95		30.
459,751.48		415,416.09		434,888.09	Dr. $	399,595.13	35,292.96		31.
					Dr.	69,562.44	69,562.44		32.
				358,471.00			358,471.00		33.
62,893,592.84		72,235,255.03		72,574,440.89		2,221,650.81		2,221,650.81	34.
3,584,147.42		12,614,356.12		16,092,333.05		74,810,232.96		2,335,892.24	35.
						474,347.14		474,347.14	36.
$ 71,848,653.10		$ 90,537,966.01		$ 94,016,886.78		31,116,789.66		15,014,356.61	37.
						$108,953,153.26		14,936,366.48	38. 39.
$ 3,227,375.63		$ 3,255,990.56		$ 3,258,491.27					40.
20,023,618.57	Dr.	22,376,434.78	Dr.	46,621,684.82	Dr.	$ 3,190,221.25	$68,260.02		41.
					Dr.	49,960,367.14	3,238,682.32		42.
$ 23,250,994.20	Dr.	$ 29,120,444.22	Dr.	$ 43,363,193.55	Dr.	$ 46,770,135.89	3,406,942.32		43.
$670,764,975.34		$678,967,871.52		$685,532,492.89		$738,893,534.23		53,361,041.34	44.

Notes of Important Changes in I. C. C. Classification of Accounts Affecting Above Balance Sheet Comparisons during Period June 30, 1935 to October 31, 1942.

. in default.
atured unpaid.

Defaulted bonds transferred from "Current Liab Term Debt" in 1940.

Account No. 764 assigned to "Unmatured interest a

rest accrued.

Account number changed from 766 to 764 in 1942.

d unpaid.
rt in default.

Defaulted interest transferred from "Current Liabili Liabilities" in 1940.

ability.

Taxes accrued in income but not due transferred Credits" to "Current Liabilities" in 1941.

ilities" to "Long

ccrued" in 1942.

ties" to "Deferred

from "Unadjusted

APPENDIX D.

RESOLUTION OF THE BOARD OF DIRECTORS OF THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ADOPTED AT A MEETING THEREOF, DECEMBER 10TH, 1942.

Be it resolved by the Board of Directors of the Chicago and North Western Railway Company:

That in the opinion of this Board it is highly desirable that the claim of the Reconstruction Finance Corporation be promptly paid. The Committee on Reorganization Matters and counsel for the Company in the reorganization proceedings are therefore authorized and directed to employ any and all appropriate means to procure early payment of that claim, wholly or in part, and to obtain release of securities held by the Corporation as collateral; to the ends that interest accruing on the claim of the Corporation shall be saved, and the securities held by it shall become available to creditors and stockholders whose claims are not fully provided for in the reorganization plan that has been approved by the United States District Court and is now pending in the Supreme Court of the United States.

Correct Copy.

ROBERT K. STUART,
Chairman, Special Committee.

Office - Supreme Court, U. S.
FILED
DEC 31 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NOS. 34, 35, 36

IN THE MATTER OF THE

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,

Respondents.

BRIEF OF LIFE INSURANCE GROUP COMMITTEE AND MUTUAL SAVINGS BANK GROUP COMMITTEE, IN OPPOSITION TO THE DEBTOR'S MOTION TO SUPPLEMENT THE RECORD.

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
GEORGE RAGLAND, JR.,
Attorneys for Life Insurance Group,

FRED N. OLIVER,
WILLARD P. SCOTT,
Attorneys for Mutual Savings Bank Group.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
OLIVER & DONNALLY,
Of Counsel.

December 29, 1942.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 34, 35, 36

IN THE MATTER OF THE

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,

Respondents.

BRIEF OF LIFE INSURANCE GROUP COMMITTEE AND MUTUAL SAVINGS BANK GROUP COMMITTEE, IN OPPOSITION TO THE DEBTOR'S MOTION TO SUPPLEMENT THE RECORD.

This is the brief of Life Insurance Group Committee and the Mutual Savings Bank Group Committee in opposition to the motion of the stockholders[1] to supplement the record in this cause.

FOREWORD AND SUMMARY OF ARGUMENT.

The motion of the stockholders is that in passing upon their petition for certiorari the Court receive and consider data which relates to, but does not in fact show, the income of the property from war-time traffic. It is a matter of common knowledge that war traffic has increased railroad earnings. In its very nature that increase is temporary and not fundamental. Our objection here is to the misleading character of the data offered and to the use which is made of it. The motion is opposed on the following grounds:

1. The present cash position of the Trustee is the result of the fact that during the period of bankruptcy there has been an accumulation of accrued and unpaid interest on debt in excess of $100,000,000, and that the large amount of federal income taxes which have been accrued on the Trustee's books have not been paid.

---

[1] While the motion is filed in the name of the bankrupt corporation, it is in fact made solely on behalf of the excluded stock interests.

2. The income of the road in the period since the effective date of the approved plan of reorganization, January 1, 1939, including the income for the year 1942, does not impeach the fairness of the plan in excluding the stock interests; on the contrary the income for that period has been insufficient to service in full the new securities provided by the plan.

3. The Commission's report shows that the element of earning capacity to which it gave dominant weight in fixing the capitalization of the property was not the earning capacity in boom years, or in depression years, but in normal future years, as shown by a most exhaustive study by the Bankruptcy Trustee's chief traffic, operating and accounting officers. In this manner the Commission sought to create a capital structure which would stand for the indefinite future, and the approved plan which rests upon that broad base could not be impeached by the earnings from war traffic in a particular year, even if on a much higher level than those realized in 1942.

4. The same conditions which have now created an almost unprecedented level of railroad traffic have also imposed heavier taxes and have otherwise increased costs and, within the month, have given rise on the one hand to demands by certain governmental agencies for sweeping freight rate reductions and, on the other, to large demands for increased wages by virtually all railway employees. The revenues and expenses of the railroads are constantly subject to the operation of so many forces of this character that their earning position is never static. Experience has

shown that the procedure under Section 77 is such that the reorganization of a large railroad cannot be consummated over the opposition of the stock interests in a short period. While the reorganization of this property is already well into its eighth year, the Circuit Court of Appeals, in approving the plan, had before it the results of the road's operations for the full year 1941.[1] If the record is held to be stale and reopened for the admission of further evidence every time conditions arise which may temporarily affect income, reorganization can never be accomplished, and the purpose of the statute is defeated.

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[1] The Commission's plan was certified to the District Court on April 2, 1940, at which time the Commission had before it the reports of operation for the full year 1939. (R. 3661) The plan was approved by the District Court on October 12, 1940 (R. 5089), and was confirmed by it on June 27, 1941. (R. 5591) The orders of the District Court approving and confirming the plan were affirmed by the Circuit Court of Appeals on February 9, 1942. (R. 5787) Under the applicable rules monthly reports are required to be filed with both the Commission and the District Court and a similar requirement was extended to the Circuit Court of Appeals by its order of September 23, 1941. There was also filed with the Circuit Court of Appeals a statement of "the actual results of 1941" prepared by the general auditor of the Trustee on February 4, 1942. The printed record contains the monthly statements up through April 30, 1941 (R. 5333), and the remaining monthly reports which were before the Circuit Court of Appeals when it decided the case were transmitted as originals to this Court. (R. 5826)

ARGUMENT.

1. The present cash position of the Trustee is due solely to the fact that claims and current liabilities greatly in excess of available cash have not been paid. During the period of the bankruptcy there has been an accumulation of accrued and unpaid interest on debt in an amount exceeding one hundred million dollars, and federal income taxes, which have been accrued on the Trustee's books in a large amount, have not been paid.

In an effort to impeach the Commission's finding that the common and preferred stocks are without value, the debtor asks the Court to receive and consider certain data respecting the 1942 earnings of the property and the present cash position of the estate. It will be shown that much of the data tendered is grossly misleading.

Counsel for the stockholders point out that there is a substantial amount of cash in the hands of the Trustee in Bankruptcy and argue that it should be used, contrary to the provisions of the approved plan, to pay the large indebtedness to the Reconstruction Finance Corporation. It can readily be shown, however, that after payment of current liabilities and claims which the Commission and the courts below have found to hold priority over the debt to the Reconstruction Finance Corporation, no cash remains for reduction of the principal of that claim.

The brief of the stock interests, after stating (p. 8) the amount due the Reconstruction Finance Corporation to be $48,178,750.87, continues as follows:

> "It is clear from the foregoing that the Trustee of Debtor's estate has ample funds on hand as of October 31, 1942, to pay off the indebtedness to the Reconstruction Finance Corporation and still have ample working

> capital to maintain the property of the Debtor now in control of the Trustee. Moreover, Appendix B shows that on November 30, 1942, cash, temporary investments and special deposits aggregated $59,575,918 and Debtor's Comptroller estimates that these items as of December 31, 1942, will exceed $60,000,000 * * *." (Appendix B, pp. 9, 10.)

We challenge the representation which is made to the Court by this argument. It will not bear analysis.

In Appendix B (p. 19) of their brief the stock interests show the estimate of cash in the hands of the Trustee on December 31, 1942, to be $52,508,000. To this amount there is added "special deposits" in the amount of 7½ million dollars, to show a "total" of $60,008,000. The accompanying certificate of the Trustee's Comptroller states:

> "* * * said figures which are described as 'Cash, Temporary Cash Investments and Special Deposits' are gross figures which do not allow for or take into consideration current liabilities, taxes, or other claims upon or against said cash, temporary cash investments and special deposits." (p. 20)

While this caveat is in very broad terms and is proper standing alone, it does not adequately suggest how grossly misleading it is to use these figures in the manner in which they are used in the brief—namely, as showing funds available for the discharge of the indebtedness to the Reconstruction Finance Corporation.

We shall refer first to the second of the two items which is $7,500,000. This is designated as "special deposits" and in the stockholders' brief carries the following note:

> "Includes, as of October 31, 1942, $5,939,930 balance in possession and control of Equipment Trustees from proceeds of sale of equipment trust notes, and

$1,902,189 representing funds set aside for specific obligations." (Their Appendix B, p. 19.)

Used in the connection in which the stockholders would use it, the item itself, and the explanation of it, are deceptive. The full and informative explanation of the item "special deposits", which was written at our request by the Trustee's Comptroller, is set forth in the footnote[1] and shows how erroneous it is to use such an item in support of an argument that the funds covered by the item are available for payment of the Reconstruction Finance Corporation debt. They are not, either in whole or in part.

Disregarding, therefore, this purely fictitious item of $7,500,000, the cash and temporary cash investments, as of December 31, 1942 (estimated), is $52,508,000, and, at the

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[1] "Special deposits" represent funds which are actually segregated from the general funds of the company, invested, held by trustees, or in special bank accounts for specific purposes.

Included in "Special deposits" as of October 31, 1942, is $5,939,930 in the hands of banks and trust companies, who are trustees under equipment trust indentures. This amount represents that part of the proceeds of the sale of equipment trust notes outstanding, or cash advances by the Railway Trustee ("advance rental") not yet paid to equipment manufacturers. Government "freezing" orders have delayed delivery of considerable equipment to be placed under these equipment trusts, and the equipment trustees will hold the $5,939,930 for payment of equipment manufacturer's invoices, or to pay off principal maturities of such equipment trust notes. *Under no circumstances, however, will the above mentioned amount be subject to disposition by the company.*

The remaining $1,902,189 in "Special deposits" as of October 31, 1942, includes the following: $476,852 withheld from wages of employes and payable to the U. S. Government for retirement taxes; $263,944 also withheld from wages of employes, at their direction, for purchase and delivery to them of war savings bonds; $688,393 set aside to provide for taxes assessed, but as yet unpaid pending the outcome of litigation; $469,000 due Eastern lines in adjustment of freight divisions and being paid in accordance with a regular program of monthly settlements; $4,000 held for redemption of bonds which had matured prior to June 28, 1935. *All of these special funds, aggregating $1,902,189, are held for payment of the specific liability or debt named and can properly be drawn upon for no other purpose.*

outset this is to be contrasted with an accumulation of interest on debt *accrued and unpaid* as of the same date, in the amount of $102,617,600.[1] There has also been an accrual of federal income taxes on the books of the Trustee in the amount of $10,792,000, which has not been paid.[1] In short, it is because the lawful debts of the estate have not been paid during the period of bankruptcy that there has been this accumulation of cash.

We desire to show in full detail the uses and purposes to which the accumulated cash in the amount of $52,508,000 must be devoted if the approved plan of reorganization is to be made effective and the debts of estate are to be recognized in the order of their priority. The Comptroller's certificate (stockholders' brief, p. 19) designates the cash figure of $52,508,000 as a "gross figure," which does not "allow for or take into consideration current liabilities, taxes accrued, or other claims upon or against said cash," but it does not identify such current liabilities, taxes, and claims.

At our request the Trustee has furnished us the statement below, certified(1) by his Comptroller which shows that when the cash on hand is distributed or earmarked in accordance with the provisions of the approved plan, the balance of free cash available for all proper corporate purposes on December 31, 1942, is actually $3,280,870, which is less by $3,899,906 than on the effective date of the plan, January 1, 1939. The Comptroller's statement is as follows:

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(1) See Appendix A of this brief.

ESTIMATED CASH ON HAND DECEMBER 31, 1942 AND PURPOSES FOR WHICH HELD, IN ACCORDANCE WITH PROVISIONS OF I. C. C. REORGANIZATION PLAN.

Cash and government bonds 9/30/42			$43,167,000
Estimated net income available for fixed charges (before Fed. taxes) 10/1-12/31	$ 8,600,000		
Depreciation and amortization 10/1-12/31	3,025,000		
Proceeds of salvage, etc	430,000	$12,055,000	
Less payments 10/1-12/31/42:			
Equipment trust interest	$ 124,000		
Interest on unfunded debt	12,000		
Additions and betterments	1,000,000		
Installment payments on equipment and cash for trust equipment	1,098,000		
Balance interest—Court Orders 531 & 577	480,000	2,714,000	9,341,000
Estimated cash and gov't bonds 12/31/42			$52,508,000

PURPOSES FOR WHICH HELD:

Balance in Add. & Better. Fund 12/31/42	$10,338,075	
1942 interest requirements (excl. equip't. trusts) under I. C. C. Reorg. Plan	8,125,303	
Jan. 1, 1943 installment to banks	219,733	
Sinking fund for divisional bonds—4 Yrs.	130,000	
Sinking fund for income bonds—2 Yrs.	1,050,590	
Accrual for federal taxes	10,792,000	
Balance 1940 income for income bonds	231,618	
Balance income for stock 1941	4,792,811	
Balance income for stock 1942	13,547,000	$49,227,130
Balance free cash—unassigned		3,280,870
Total cash and bonds 12/31/42		$52,508,000

RECONCILIATION OF CASH:

Cash on hand Jan. 1, 1939	$ 7,180,776	
Less diversion to increase in other assets:		
Increase in balances due from agents	$ 1,833,492	
Increase in amounts due from U. S. Gov't.	2,109,363	
Increase in material & supply inventory	627,476	
Increase in liabilities over other assets Cr.	670,425	3,899,906
Balance free cash, as above	$ 3,280,870	

Total interest on debt, accrued and unpaid, to December 31, 1942 ... $102,617,600

The items under the caption "PURPOSES FOR WHICH HELD" show that an observance of the approved plan requires the distribution or earmarking of $49,227,130 of the cash in the hands of the Trustee.

The first item of $10,338,075 is the amount which, pursuant to the approved plan, is to be set aside for the additions and betterments which are necessary to enable the road to operate and discharge its public function. In substance it is a depreciation and emergency fund. Other large items cover interest and other requirements which the Commission and the courts below have found to be prior to any reduction of the indebtedness to the Reconstruction Finance Corporation. Another large item is $10,792,000 which represents an accrual on the Trustee's books of federal income taxes. The last two items cover the amounts available for distribution to the new preferred and common stock which has been taken by senior creditors in payment of substantial portions of their respective claims on the basis of $100 per share.

As shown by the Comptroller's statement these allocations leave a "Balance of free cash—unassigned" in the amount of only $3,280,870 as of December 31, 1942. This is actually less by $3,899,906 than the $7,180,776 of "Cash on hand January 1, 1939", the effective date of the approved plan. It is obvious that the payment of the Reconstruction Finance Corporation claim, as proposed, would violate the priorities recognized by the approved plan and would, of course, as the stockholders desire, prevent the consummation of the plan.

In this connection we call attention to the position taken by the same interests as late as October 13, 1941, in the District Court, in opposition to a petition by certain creditor banks, whose claims are fully secured, to authorize certain payments to them *pursuant to the plan.* Although

the payments then proposed were small in relation to the indebtedness to the Reconstruction Finance Corporation, the stockholders opposed the payment and in their answer alleged, as follows:

> "5. Further answering, Debtor states that the cash now in the hands of the Trustee should be kept intact, as upon the amount of such cash depends the workability of any plan of reorganization which might be put into effect, and the emergencies of national defense might require a sudden expenditure of funds not now anticipated, to meet the demands of which an adequate supply of cash should be maintained."

2. The earnings of the property in the period since the effective date of the plan confirm the action of the Commission in excluding the stock interests from participation in the reorganized company. Those earnings do not permit a full return on the new preferred and common stocks which are taken by senior creditors on the basis of $100.00 per share.

The Balance Sheet, as of October 31, 1942 (Stockholders' Brief, Appendix A, Sheet 2) with its catalogue of investments in physical property furnishes no criterion of the fairness of the Commission's plan.[1]

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[1] Reference may be made to two items in the note appended to the balance sheet entitled: "The following payments for redemption of debt and interest have been made since June 28, 1935." Under the caption "Redemption of debt"—"Period June 28, 1935 to October 31, 1942" we find this item:

"Equipment Trust Certificates $20,425,000."

A fact not disclosed by the statement is that in the same period the Trustee of the property found it necessary to issue new equipment trust certificates in the amount of $21,535,000 with a resulting *increase* in outstanding certificates of more than a million dollars.

Under the caption "Payment of Interest—Period June 28, 1935 to October 31, 1942" this item appears:

"Bonds $13,685,345.65."

As we have pointed out elsewhere herein the accruals of *unpaid* interest to December 31, 1942 in spite of such payments, amount to $102,617,600.

We submit that the final test of any contention that the recent earnings of the estate show value in the old stock is to see what return those earnings produce for the senior creditors on the securities which they receive under the plan.

The two principal liens on the property are the General Mortgage on the lines east of the Missouri River under which bonds are outstanding in the principal amount of $132,019,000, and the First and Refunding Mortgage, first lien on the lines west of the Missouri River under which bonds are outstanding in the principal amount of $47,822,000. On January 1, 1939, the effective date of the plan, the claim per $1,000 General Mortgage 5% bond, amounted to $1,183, and the claim per $1,000 First and Refunding 5% bond, to $1,179.[1] On the opposite page a statement prepared at our request by the Trustee's Comptroller shows the classes and amounts of new securities allotted under the plan in compensation for these respective claims and sets out the maximum amount distributable to those securities in each of the four years (1942 estimated) since the effective date of the plan. For the purpose of this tabulation it has been assumed that the entire income technically available for distribution to the preferred and common stocks, is actually paid on these stocks, although in practice, of course, such a complete distribution would be unlikely. On this basis, the tabulation shows that on the securities allotted to the General Mortgage bondholder per $1,183 of claim, he would receive an average annual return for the four-year period of 2.986%. The First and Refunding bondholder would receive, per $1,179 of claim, an average annual return for the four-year period of 2.46%.[1]

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[1] The total claim on General Mortgage and First and Refunding bonds varies slightly in accordance with the interest rates which the different classes of those bonds bear.

EARNINGS AVAILABLE AND RATE OF RETURN ON C. & N. W. GENERAL MORTGAGE 5% BONDS, BASED ON NEW SECURITIES ALLOTTED IN I. C. C. REORGANIZATION PLAN, YEARS 1939 TO 1942, INCL. (1942 ESTIMATED).(1)

Earnings A

		1939		1940	
C. & N. W. General Mortgage 5% Bond		Rate		Rate	
Par value	$1000				
Amount of claim 12/31/38	1183				
New securities allotted in I. C. C. Reorganization Plan:					
1st & Gen. Mtge. Bonds	208	3¼	$6.76	4¾	$ 9.88
Income bonds	485	—	—	2.72	13.19
Preferred stock	447	—	—	—	—
Common stock	43	—	—	—	—
Total			$6.76		$23.07
Rate on return:					
On par value			0.676%		2.307%
On amount of claim			0.571%		1.950%
C. & N. W. 1st & Refunding Mortgage 5% Bond					
Par value	$1000				
Amount of claim 12/31/38	1179				
New securities allotted in I. C. C. Reorganization Plan:					
1st & Gen. Mtge. bonds	154	3¼	$5.01	4¾	$ 7.31
Income bonds	233	—	—	2.72	6.34
Preferred stock	307	—	—	—	—
Common stock	485	—	—	—	—
Total			$5.01		$13.65
Rate of return:					
On par value			0.501%		1.365%
On amount of claim			0.425%		1.157%

Accounting Department.

December 22, 1942.

(1) This statement was prepared and is certified as correct by the Trustee's C
ame Appendix we direct attention also to another statement prepared by the C
ixed charges under I. C. C. Reorganization Plan. Years 1939, 1940, 1941 and

tAL MORTGAGE 5% BONDS AND FIRST & REFUND-
D BY I. C. C. REORGANIZATION PLAN, FOR THE

vailable for New Securities

1941 Rate	1941	1942 (Estimated) Rate	1942 (Estimated)	Total Four Years	Average Per Year
4	$ 8.32	4	$ 8.32	$ 33.28	$ 8.32
4½	21.83	4½	21.83	56.85	14.21
4.47	19.98	6.36	28.43	48.41	12.10
—	—	6.36	2.73	2.73	.69
	$50.13		$61.31	$141.27	$ 35.32
	5.013%		6.131%		3.532%
	4.238%		5.183%		2.986%
4	$ 6.16	4	$ 6.16	$ 24.64	$ 6.16
4½	10.48	4½	10.48	27.30	6.83
4.47	13.72	6.36	19.53	33.25	8.31
—	—	6.36	30.85	30.85	7.71
	$30.36		$67.02	$116.04	$ 29.01
	3.036%		6.702%		2.901%
	2.575%		5.684%		2.460%

'omptroller. See Appendix B, this brief. As a part of the
'omptroller entitled "Disposition of income available for
1942 estimated."

It will be noted that under the allocation studies on which the distribution of securities provided by the plan was based, the General Mortgage bondholders received for each $1,000 bond, $447 of preferred stock and $43.00 of common stock—both taken at $100 per share. The First and Refunding bondholders received $307 of preferred stock and $485 of common stock. Four years have elapsed since the effective date of the plan. In 1939 the road did not earn the interest on the new income bonds. The increase in railroad traffic due to war conditions began early in 1940[1], but in that year interest was earned on the income bonds at the rate of only 2.72% and nothing was earned on the new stocks. It was not until 1941, the third of these four years, that there were any earnings on the new preferred stock and nothing was available for the new common stock until this year, the fourth, when the war effort produced an unprecedented volume of traffic. The earnings available for the new preferred and common stocks, in 1942 were at the rate of $6.36 per share,[2] and as stated it would be

[1] War was declared to exist between Great Britain, Germany, France and Poland on September 3, 1939, and a limited national emergency was proclaimed by the President of the United States on September 8, 1939. The Office for Emergency Management was established by the administrative order of the President on May 25, 1940. The Office of Production Management was created by executive order of the President on January 9, 1941, and the Lend-Lease Aid Act was approved March 11, 1941.

[2] The "earnings available for new securities" shown in this tabulation for the preferred stock and common stock are on the basis of the federal income taxes accrued by the Trustee on the books of the company. In computing the taxes thus accrued the amount of interest deducted from income was that accruing on the fixed and contingent interest bearing securities to be issued under the plan and not the larger amount of interest which is still actually accruing on the old securities. The actual tax liability of the property for the period since the effective date of the plan has not been determined. It will be contended, and we believe soundly, that until the actual consummation of the plan, the debtor should have the benefit of the interest actually accruing under the old capital structure, but however that question may be determined, the amount of the income tax accrued on the books by the Trustee in Bankruptcy and reflected in the Comptroller's tabulation will be the amount payable by the reorganized company after the consummation of the plan on the same level of income, assuming, of course, no change is made in the tax rates.

necessary that every penny of this amount be actually distributed to bring the average annual return of the senior creditors,—the General Mortgage bondholders and the First and Refunding mortgage bondholders for the four-year period, up to 2.986% and 2.46%.

In contrast to the contention that present conditions indicate value in the old preferred and common stocks we direct attention to the values which the public has placed upon the *new* stocks, as reflected in the current market transactions in those securities on a "when issued" basis, as reported by "The Commercial and Financial Chronicle." On December 18, 1942, the quotations were as follows:

Preferred stock $24.00 per share.
Common stock $5.25 per share.

3. The approved plan is based on the true, long term earning capacity of the road as shown by the comprehensive studies described below.

The Commission recognized that its duty under the statute was to formulate a plan which would serve as a basis for the financial structure of the reorganized company for the indefinite future. It would have been most improper for the Commission to have attempted to base its plan for this property on the results of an abnormal period, since the income in past years has fluctuated from a high of some thirty million dollars down to slightly more than a million dollars. The Commission made no such attempt. Instead it based its plan on the most reliable and informative data available as to the road's normal expectancy of income. The chief traffic, operating and accounting officials in the employ of the Trustee in Bankruptcy, who had long occupied similar positions with the debtor before bankruptcy, assisted by a large staff, labored for many

months in making the necessary investigations. (R. 2094, 2204, 2237.) Their searching studies as to what might reasonably be expected in the normal future year covered the volume of production and movement of each class of traffic, the total freight tonnage, the average haul, the applicable ton-mile rate, and the total income from freight and all other sources and the expenses of operation.[1] (R. 3512-7.)

Each of these subjects required the assembling and consideration of a mass of statistical and historical data. A thorough examination was made of the volume, consist and trend of traffic handled by the debtor during the preceding twelve years, together with the earnings derived therefrom. In the development of this data, studies were made also of traffic handled by the debtor's principal railroad competitors, and the relation of the debtor's traffic to the entire volume in the territory. (R. 2122-2124.) A survey was made of the past and prospective movement of agricultural traffic by competing agencies of transportation, such as trucks and waterways, and consideration was given to the long range effect of such movement upon the volume to be handled and the rates which could be maintained thereon. (R. 2104-2109; Com. Exs. 359, 368.) The trends in general population and farm population and of farm income in the states served by the debtor were studied and compared with those for the country as a whole. (R. 2112-2113; Com. Exs. 369, 370.) Field studies were carried on throughout the entire territory served by the railroad to

[1] While earning power in the prospective normal year was used as the primary determinant of value, the Commission gave weight to all other relevant elements. In order to permit the fullest possible participation in the reorganized company, the Commission substantially increased the new capitalization beyond that "supported by the earnings of the normal year reasonably to be expected," as shown by these studies, by taking "into account the reproduction value of the property and the favorable past earnings, as well as the unfavorable recent and prospective earnings." (R. 3658, 3579.)

obtain the opinions of county agents, state agricultural officers, rural traffic officers and station agents of the debtor and other railroads. Extensive use was made of the facilities of every agricultural college in the territory served. A detailed questionnaire was submitted to the agricultural agent in each county through which the debtor operates and the returns collated and analyzed. (R. 2124-2134.) An extensive survey was made of the rate level and the trend of rates over a long period of years, as a basis for assumptions as to the rate level reasonably to be anticipated in the future. (Com. Ex. 380, sheet E.) All available technical information and advice was collected to determine the normal precipitation in the territory served, and the production to be anticipated under conditions of normal rainfall. (R. 2100-2101; Com. Exs. 355-356.) Normal agricultural policies were studied as to their probable bearing upon the production and export of agricultural commodities. (R. 2095-2096.) Similar painstaking investigations were made of all of the principal commodities transported. Detailed consideration was given to the all important factor of competition with trucks and other forms of transportation with respect to each principal commodity transported. (Com. Exs. 380, 382, 384, 385 and 391.)

Based upon this intensive survey of traffic trends and prospects, three detailed estimates of earning power in the normal future year were presented,—one by the department heads of the carrier, one by the Mutual Savings Bank Group and one by the Life Insurance Group. These three estimates differed to some extent but were within a reasonably close range. The Commission weighed all of the evidence and then reached its own conclusions as to the carrier's normal expectancy of income. These it embodied in the approved plan.

Certainly no greater disservice could have been done this property and all who have a real interest in it than for

the Commission to have based its plan on abnormal conditions. Reliance upon war boom earnings would ignore the lessons "from past experience that the upswing in business which war brings is temporary and likely to be followed by an aftermath in which conditions are worse than before."[1] "The principles of sound financing and the public interest" prevent the Commission from so ignoring the lessons of history in approving capitalizations for reorganization railroads.[2]

On August 10, 1942, in its report in the *Florida East Coast* reorganization the Commission stated:

> "Under present conditions, the fact that the year 1942 gives promise of producing even larger earnings than 1941 affords too uncertain and precarious a basis to justify the increases [in capitalization] sought."[3]

We submit that the Commission correctly formulated its plan of reorganization for this property on a long-term basis so that the plan may meet the needs of the carrier, its security holders, and the public, during the years, both good and bad, which lie ahead.

4. The efforts of debtors to put off the day of reckoning are unending and to reopen this record under the circumstances here would be contrary to the intent and purpose of Section 77.[4]

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[1] Fifty-third Annual Report of the Interstate Commerce Commission to Congress, p. 5.

[2] *New York, New Haven & Hartford Railroad Company Reorganization* (Finance Docket No. 10992) ..... I. C. C. .....

[3] *Florida East Coast Ry.* (Finance Docket No. 13170) .... I. C. C. .....

[4] In *Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648, the Court said:

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted." (p. 685)

Speaking of the effect of war conditions upon the railroad enterprise Mr. Eastman has said:

> "Let me suggest, however, that those who regard these present earnings as evidence of the unsoundness of our reorganization plans may well give heed to the source from which these earnings spring and to the future conditions which are likely to flow from this same source. * * * All this in the end means burden and sacrifice for all concerned. * * *"(1)

The same conditions which have imposed a staggering burden of war traffic upon the railroads have also made necessary large capital expenditures to meet a condition which is obviously temporary. The general rise in prices has not only increased the cost of materials and supplies but brought an early demand by railroad labor for increased wages. The settlement of that demand late in 1941, following a recommendation by the President's Emergency Board, increased the expenses of the railroad as a whole by approximately $311,711,000. Of necessity, higher income taxes have been imposed but no showing in respect to these charges against income is made in the evidence tendered by the motion under discussion.

To offset partially the increased cost of railroad operation the Interstate Commerce Commission authorized increases in passenger and freight rates which became effective early in 1942. The Price Administrator on his own behalf and on behalf of James F. Byrnes, Director of Economic Stabilization, the Secretary of Agriculture and other governmental agencies have now petitioned the Commission to remove these increases. In the face of that threat to their revenues railroad labor is now demanding a second increase in wages. The total demand of all crafts is estimated to be in excess of $650,000,000. The experience of the railroads over the years shows that their revenues and expenses are

(1) Published Address of Commissioner Eastman before the National Association of Mutual Savings Banks at Philadelphia on May 7, 1941.

so constantly subject to forces of this character that their earning position is not stable for any extended period. It has already been demonstrated that the reorganization of a large railroad under Section 77 cannot be consummated in a short period over the opposition of the stock interests. The earning data for this estate continued to be incorporated in the record long after the proceeding was docketed in the Court of Appeals and almost to the date of its decision. It is submitted that if the purpose of the statute is to be accomplished there must come a time when the record is finally closed. The excluded stock interests should not be permitted to secure a reopening of the record to tender proof of the new factors affecting income which are constantly arising.

We respectfully ask that the motion be denied and that the petitions for certiorari likewise be denied. We particularly ask that if certiorari be denied this Court neither expressly nor impliedly, as requested by the stock interests, authorize the District Court to entertain a motion that it nullify and make impossible the consummation of the approved plan by directing payment of the large indebtedness to the Reconstruction Finance Corporation.

Respectfully submitted,

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EARNINGS AVAILABLE AND RATE OF RETURN ON C. & N. W. GENERAL MORTGAGE 5% BONDS AND FIRST & REFUNDING MORTGAGE 5% BONDS, BASED ON NEW SECURITIES ALLOTTED BY I. C. C. REORGANIZATION PLAN, FOR THE YEARS 1939 TO 1942, INCL. (1942 ESTIMATED).

		Earnings Available for New Securities									
		1939		1940		1941		1942 (Estimated)		Total Four Years	Average Per Year
C. & N. W. General Mortgage 5% Bond		Rate		Rate		Rate		Rate			
Par value	$1000										
Amount of claim 12/31/38	1183										
New securities allotted in I. C. C. Reorganization Plan:											
1st & Gen. Mtge. Bonds	208	3¼	$6.76	4¾	$ 9.88	4	$ 8.32	4	$ 8.32	$ 33.28	$ 8.32
Income bonds	485	—	—	2.72	13.19	4½	21.83	4½	21.83	56.85	14.21
Preferred stock	447	—	—	—	—	4.47	19.98	6.36	28.43	48.41	12.10
Common stock	43	—	—	—	—	—	—	6.36	2.73	2.73	.69
Total			$6.76		$23.07		$50.13		$61.31	$141.27	$ 35.32
Rate on return:											
On par value			0.676%		2.307%		5.013%		6.131%		3.532%
On amount of claim			0.571%		1.950%		4.238%		5.183%		2.986%
C. & N. W. 1st & Refunding Mortgage 5% Bond											
Par value	$1000										
Amount of claim 12/31/38	1179										
New securities allotted in I. C. C. Reorganization Plan:											
1st & Gen. Mtge. bonds	154	3¼	$5.01	4¾	$ 7.31	4	$ 6.16	4	$ 6.16	$ 24.64	$ 6.16
Income bonds	233	—	—	2.72	6.34	4½	10.48	4½	10.48	27.30	6.83
Preferred stock	307	—	—	—	—	4.47	13.72	6.36	19.53	33.25	8.31
Common stock	485	—	—	—	—	—	—	6.36	30.85	30.85	7.71
Total			$5.01		$13.65		$30.36		$67.02	$116.04	$ 29.01
Rate of return:											
On par value			0.501%		1.365%		3.036%		6.702%		2.901%
On amount of claim			0.425%		1.157%		2.575%		5.684%		2.460%

Accounting Department. December 22, 1942.

I, Charles H. Westbrook, Comptroller of Chicago and North Western Railway Company, do hereby certify that except for the parts of the foregoing statement marked "Estimated" the figures contained therein are true and correct as shown by the books and records of said trust estate; that the parts marked "Estimated" reflect my own judgment of the estimated results for the period indicated, actual figures for a portion of said period not being presently available, and the tabulations involving an application of the approved plan of reorganization reflect my own interpretation thereof.

Dated at Chicago, Illinois, this 29th day of December, 1942.

CHARLES H. WESTBROOK.

DISPOSITION OF INCOME AVAILABLE FOR FIXED CHARGES UNDER THE I. C. C. REORGANIZATION PLAN
Years 1939, 1940 and 1941, and 1942 Estimated

	1939	1940	1941	1942 (Estimated)	Total 1939-1942
ome available for fixed charges.	$ 7,345,481	$11,224,665	$17,793,040	$23,700,000	$60,063,186
Less interest and dividends from U. P. Stock and N. Y. C. Bonds	173,860	173,860	173,860	174,000	695,580
	$ 7,171,621	$11,050,805	$17,619,180	$23,526,000	$59,367,606
ed Charges:					
Rent for leased roads and equipment	$ 4,967	$ 5,427	$ 5,576	$ —	$ 15,970
Interest on equipment trust certificates	404,983	351,740	311,187	525,000	1,592,910
Fixed interest on new securities.	2,402,842	2,379,882	2,361,464	2,351,500	9,495,688
Interest on unfunded debt	69,432	146,240	95,785	56,000	367,457
Total fixed charges	$ 2,882,224	$ 2,883,289	$ 2,774,012	$ 2,932,500	$11,472,025
Available net income	$ 4,289,397	$ 8,167,516	$14,845,168	$20,593,500	$47,895,581
plication of available net income:					
Annual maturities of notes	$ 456,033	$ 456,033	$ 456,033	$ 456,000	$ 1,824,099
Sinking fund on divisional bonds	32,500	32,500	32,500	32,500	130,000
Accrual of additions and betterments fund	3,000,000	3,000,000	3,000,000	(a)	9,000,000
Sioux City Bridge Co. dividend applied in reduction of R.F.C. principal	50,000	50,000	50,000	50,000	200,000
	$ 3,538,533	$ 3,538,533	$ 3,538,533	$ 538,500	$11,154,099
come available for contingent interest	$ 750,864	$ 4,628,983	$11,306,635	$20,055,000	$36,741,482
cess income assignable to commutable interest from 1939	—	120,425	—	—	—
mmutable interest earned and payable (c)	630,439	1,891,317 (b)	1,260,878	1,255,000	5,037,634
come available for interest on income bonds	—	$ 2,858,091	$10,045,757	$18,800,000	$31,703,848
terest on income bonds, earned and payable	—	2,626,473 2½%	4,727,651 4½%	4,727,500 4½%	12,081,624
come reserved for income bond interest	—	231,618 .22%	—	—	231,618
t income after providing for interest on income bonds	—	—	$ 5,318,106	$14,072,500	$19,390,606
nking fund for income bonds	—	—	525,295	525,500	1,050,795
Balance for stock			$ 4,792,811	$13,547,000	$18,339,811
Preferred Stock	—	—	$ 4,792,811 4.47%	$ 6,686,000 6.36%	$11,478,811
Common Stock	—	—	—	6,861,000 6.36%	6,861,000

) Depreciation on roadway property substituted for A. & B. fund contribution from income in 1942, included as an operating expense charge in arriving at "Income available for fixed charges."

) Includes $630,439 (¾%) not earned in 1939.

) Commutable contingent interest, having been earned for three successive years, becomes fixed as of January 1, 1943.

I, Charles H. Westbrook, Comptroller of Chicago and North Western Railway Company, hereby certify that except for the parts of the foregoing statement marked "Estimated" the ures contained therein are true and correct as shown by the books and records of said trust es that the parts marked "Estimated" reflect my own judgment of the estimated results for period indicated, actual figures for a portion of said period not being presently available, and tabulations involving an application of the approved plan of reorganization reflect my own in pretation thereof.

Dated at Chicago, Illinois, this 29th day of December, 1942.

CHARLES H. WESTBROOK

JAN 2 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

IN THE MATTER OF

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, *et al.,*

Respondents.

ANSWER TO MOTION OF DEBTOR TO SUPPLEMENT RECORD

LEONARD D. ADKINS,
Attorney for Respondents
George W. Bovenizer, et al.,
15 Broad Street,
New York, N. Y.

December 31, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

IN THE MATTER OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Debtor.* CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR, *Petitioner,* VS. MUTUAL SAVINGS BANK GROUP COMMITTEE, *et al.*, *Respondents.*	Nos. 34-35-36.

ANSWER TO MOTION OF DEBTOR

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned counsel for George W. Bovenizer, *et al.*, as a Committee for Holders of Collateral Notes of the Debtor, Chicago and North Western Railway Company, one of the Respondents in the above-entitled cases, answering the "Motion to Supplement Record" dated December 17, 1942, filed by counsel for the Debtor herein, respectfully states as follows:

1. The petitions for certiorari pending in this Court in the above and companion Dockets relate to certain orders or decrees of the United States Circuit Court of Appeals for the Seventh Circuit affirming certain orders of the District Court of the United States for the Northern District of Illinois, Eastern Division, including an order, entered June 27, 1941, confirming the Plan of Reorganization of the Debtor, Chicago and North Western Railway Company.

2. In passing on said petitions for certiorari, this Court is concerned only with the question whether said decrees or orders of the Circuit Court of Appeals affirming said orders of the District Court involved questions of public or general interest or questions in respect of which conflict existed as among the several Circuit Courts. It is entirely obvious that the material which counsel for the Debtor seeks to add to the record can have no bearing on this Court's determination of that question.

3. Even if this Court should decide to grant one or more of the pending petitions for certiorari, the only question to be considered by this Court would be the correctness of the action taken by the Circuit Court of Appeals on February 9, 1942 in affirming said orders of the District Court entered on June 27, 1941. It is equally obvious that the material which counsel for the Debtor seeks to add to the record can have no bearing on that determination, since all such material relates to events subsequent to June 27, 1941. The correctness of the action taken by the District Court on June 27, 1941 cannot be determined by subsequent events.

4. The rights of the parties in respect of the reorganization of the Debtor became finally fixed, under the provisions of Section 77 of the Bankruptcy Act, when the District Court confirmed the Plan, subject only to reversal, on appeal, of the order confirming the Plan. If this Court should refuse to grant certiorari or should grant certiorari and thereafter affirm the decision of the Circuit Court of Appeals, the District Court would have no power to entertain the proposed petition (referred to in the Motion to Supplement Record) to pay off the debt to Reconstruction Finance Corporation, if such payment would change the rights of the parties under the Plan. It would, therefore, be obviously improper for this Court, if it should refuse to grant certiorari, to state, as requested by counsel for the Debtor, that such refusal was without prejudice to the Debtor's right to file such a petition in the District Court.

5. Wherefore, respondents George W. Bovenizer, *et al.*, respectfully urge that the Debtor's Motion to Supplement Record be denied in its entirety.

LEONARD D. ADKINS,
Attorney for Respondents
George W. Bovenizer, et al.,
15 Broad Street,
New York, N. Y.

Dated at New York, N. Y.,
December 31, 1942.

BRIEF IN SUPPORT OF ANSWER

The Motion to Supplement Record is in form simply a request to have included in the Record certain information in regard to the current earnings and current cash position of the Debtor's estate. We have no objection to having this Court take judicial notice of the fact that the Debtor, in common with all other railroads, is at the present time enjoying large earnings as a result of war conditions and by reason of such earnings has accumulated substantial amounts of cash, so long as it also takes judicial notice of the obviously temporary nature of such earnings.

The real purpose of the Motion, however, is to persuade this Court to take the position that this Plan of Reorganization should be scrapped, not because of any error in the decisions which this Court has been asked to review, but because of the present prosperity of the Debtor and other railroads due to war conditions.

The petitions for certiorari were filed to ask this Court to review the correctness of the Circuit Court's decrees entered February 9, 1942 (Tr. 5816 ff.) affirming the action taken by the District Court in approving and confirming the Plan. The Motion to Supplement Record suggests the novel principle of law that the correctness of those decrees of the Circuit Court should be determined, not on the basis of the record before that Court and the facts as they existed at the date of those decrees, but on the basis of events subsequent to the date of entry of those decrees.

The Circuit Court of Appeals was well aware of the current war prosperity of the Debtor at the time of the entry of its decrees. In its opinion the Court said (Tr. 5804):

> "This radical change (for the better) in the past year can not and should not be ignored. * * * It is something we can, and should, and do, take judicial notice of. It is, we believe, temporary, and like a crop failure year, in the Northwest—which this Debtor serves—not to be taken too seriously when viewing the long future of this railroad. In making this statement we are aided by the experiences of railroads during and after the last war."

Counsel for the Debtor rely primarily on this Court's decision in *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248 (1932), and other cases in which this Court considered the effect of economic changes on the reasonableness of rates fixed without regard to such changes. There is no analogy between those cases and the present case. In the *Atchison* case the Interstate Commerce Commission, in a proceeding to lower rates on grain and other farm products, had refused to permit a rehearing for the introduction of evidence of a drastic nationwide decline in railroad earnings which had occurred after the close of the hearings before the Commission. This Court held that the Commission had acted improperly in refusing to receive the additional evidence tendered.

There are two basic distinctions between the situation in the present case and that presented to this Court in the *Atchison* case. In the *Atchison* case this Court's problem was whether rates fixed on the basis of relatively high railroad earnings could be permitted to stand when there had been a complete change in the level of earnings. Since rates must be fixed so as to yield reasonable compensation, they are necessarily subject to change from time to time as a result of shifting economic conditions. They are not fixed

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for all time on the basis of estimated normal earning power. But the capitalization of a reorganized railroad must necessarily be so fixed. This basic distinction makes the *Atchison* case (and the other rate cases cited in the Motion) entirely inapplicable to the questions now before this Court.

Moreover, the ground for reversal in the *Atchison* case was that the Interstate Commerce Commission, the basic fact finding body, had itself refused to receive evidence of changed conditions, although seasonably requested to do so. No such question is here involved. It is not alleged, nor is it the fact, that either the Interstate Commerce Commission or the District Court refused to consider any evidence which it was asked to consider.

The Motion raises the basic question whether the time ever comes when a railroad reorganization can be consummated under the procedure described by Section 77 of the Bankruptcy Act. If it be true, as the Debtor would have this Court hold, that changed conditions (however temporary such changes may be) after the confirmation of a Plan by the District Court form a basis for sending the Plan back to the Interstate Commerce Commission for revision in the light of such temporary changes, the necessary result is that railroad reorganization proceedings, which in many cases have already dragged out for almost ten years, may well continue for another ten years. If this Plan should now be referred back to the Interstate Commerce Commission and if it should thereupon be revised, as the Debtor would have it revised, to increase capitalization on the basis of war earnings, it is entirely possible that by the time the revised plan has reached the stage of confirmation, after going through the elaborate machinery prescribed by Section 77 and after being subjected to the inter-

minable delays to which any plan can be subjected under that machinery by determined opponents, railroad earnings will again have sunk to so low a level that the revised plan would cease to be either fair or feasible. If the principle for which the Debtor contends were accepted by this Court a further revision of the Plan would then be requisite to shrink the capitalization to fit the then existing economic conditions. We are confident that this Court will not look with favor on any suggestion which contemplates an indefinite continuation of railroad reorganization proceedings.

Section 77 expressly provides (Section 77(f)) that, when a plan of reorganization has been duly confirmed by the District Court, the rights of the parties have been finally and definitely established subject only to the "right of judicial review." Certainly the phrase "right of judicial review" does not contemplate a change in those established rights as a result of conditions which may arise after the entry of the order of confirmation. Any other interpretation of Section 77 would, as pointed out above, make the completion of any reorganization impossible.

If this principle is sound, as we believe it to be, it would be obviously improper for this Court, if it should refuse to grant certiorari, to do so without prejudice to a petition to the District Court for payment of the debt to Reconstruction Finance Corporation. If such a petition were to be made for payment to the R. F. C. by way of prepayment of securities to be issued to R. F. C., under the Plan, it could be considered by the District Court without any action by this Court. But the Debtor contemplates that its petition, if granted, would necessarily completely disrupt the Plan and would require the writing of a new plan by the Commission and the repetition of all the elaborate pro-

cedure required by Section 77. The Debtor recognizes the improbability of any reversal by this Court of the decrees of the Circuit Court of Appeals and is attempting by this extraordinary device to postpone reorganization in the vague hope of securing some participation for the stockholders of the Debtor. It is obvious that the District Court can have no power to grant such a petition, since the rights of the parties are already fixed by the order confirming the Plan.

Efforts to disrupt pending reorganization plans by forcing the application of cash to the payment of indebtedness in such a way as to nullify such plans have become a popular device of representatives of stockholders seeking to delay the consummation of reorganization plans. We strongly urge that this Court, by prompt denial of the Motion in its entirety and by prompt action on the pending petitions for certiorari, show that delaying tactics of that nature will not be sanctioned by this Court. The public interest requires prompt railroad reorganizations. Rights of security holders must be protected, but the protection of such private rights is fully assured by the procedure prescribed by Section 77 and must not be extended to permit interminable litigation.

Respectfully submitted,

LEONARD D. ADKINS,
Attorney for Respondents
George W. Bovenizer, et al.,
15 Broad Street,
New York, N. Y.

December 31, 1942.

In the Supreme Court of the United States

OCTOBER TERM, 1942

NOS. 34, 35, 36

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR, PETITIONER

v.

MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY OF RECONSTRUCTION FINANCE CORPORATION TO MOTION OF PETITIONER TO SUPPLEMENT RECORD

Reconstruction Finance Corporation, a public corporation created by Act of Congress (47 Stat. 5), is the holder of notes of the Debtor aggregating with accrued interest to January 1, 1939, the effective date of the plan of reorganization, $49,184,905, and secured by important collateral. As a respondent on the pending petitions for certiorari herein, Reconstruction Finance Corporation is supporting the plan of reorganization for the Debtor, approved and certified to the District Court by the Interstate Commerce Commission, approved and, after the taking of a vote of the creditors, later

confirmed by the District Court and subsequently approved on appeal by the Circiut Court of Appeals for the Seventh Circuit.

In the present memorandum Reconstruction Finance Corporation desires to set forth briefly its views with respect to the motion of the Debtor, one of the petitioners for certiorari, to supplement the record in this Court, and with respect to the brief submitted in support of such motion.

I

This respondent has no objection, if it should seem desirable to the Court, to the addition to the record before this Court of such part of the papers submitted by the Debtor as contain or purport to contain statements of existing facts. Apparently the chief purpose of the additional material is to show that as the result of our national war effort the earnings of the Debtor's properties have substantially increased in the last year or two, and we are entirely willing that the Debtor should be able to show this fact for what it may be worth. We are confident, however, that, in accordance with the repeated conclusions of the Interstate Commerce Commission and the lower courts referred to in our brief and argument in the *Western Pacific* and *Milwaukee* cases now pending in this Court (Nos. 7, 8, 20, 33 and 61 and Nos. 11–19, 32, respectively), this Court will feel that such temporary earnings afford no sound basis upon which to build a

permanent capitalization for the reorganized company.

We do not, however, take the position that permission thus to supplement the record is to be granted freely or as a matter of right. It is of some significance that the cases cited by the Debtor are all cases in which the trial court or administrative tribunal did not at the time of its decision or the effective date thereof have before it an up-to-date record. The ready addition of subsequent data would lead to interminable controversies and attempted trials *de novo* before the appellate courts. Particularly is this true in railroad reorganizations, where because of the lengthy proceedings involved and the extent to which the railroads are bound up with our national economy some change in the factors involved can always be alleged.

The material proposed by the Debtor to be incorporated in the record falls into three classes: (i) documents (Appendix A to the Debtor's motion) filed in the District Court subsequent to the appeals and constituting a part of the record in that court in these proceedings but not on the appeals, (ii) data (part of Appendix B to the Debtor's motion) not constituting any part of the record in these proceedings but purporting to state existing facts and (iii) additional data (the remainder of Appendix B to the Debtor's motion) not now constituting any part of the record in

these proceedings and purporting to set out the estimates or judgment of the comptroller of the Debtor as to what certain future facts will prove to be. As stated above, if this Court in its discretion should deem it desirable we have no objection to the inclusion in the record of the additional material of class (i), or even to that falling within class (ii). We do object, however, to the attempted inclusion in the record before this Court of that part of the Debtor's proposed material falling within class (iii), being estimates or predictions not now a part of the record as to what will happen in the future.

II

We desire also to comment briefly upon the Debtor's suggestion, not made a part of its motion but appearing for the first time in the brief in support of the motion, that "in the event it [this Court] should conclude that the judgment of the Circuit Court of Appeals should be affirmed by this Court without argument, the order of this Court expressly state that such action is taken without prejudice to the presentation to the District Court of a petition for an order directing the Trustee of the Debtor's estate to pay the principal and interest of the claim of the Reconstruction Finance Corporation" (brief p. 7).

As a lending institution Reconstruction Finance Corporation is of course interested in the payment of the loans which it has made. As the most de-

sirable method of securing such payment, both in its own interest and in the interest of the Debtor and its other security holders, Reconstruction Finance Corporation is supporting without reservation the plan which has been approved by the Interstate Commerce Commission, by the District Court, and by the Circuit Court of Appeals, and is in accord with the disposition of its claims against the Debtor under that plan. Even more fundamentally, both as a creditor of the Debtor and as a public corporation interested in general railroad rehabilitation and in the national economy as a whole, Reconstruction Finance Corporation is desirous of seeing the reorganization of the Debtor completed at the earliest possible date. The plan of reorganization approved and confirmed as above mentioned affords solid hope of such early consummation, which might otherwise be delayed for a number of years.[1] Accordingly Reconstruction Finance Corporation is not asking for the payment of that claim in cash at this time.

It is also to be borne in mind that the plan in the present case has not only been approved by the District Court, but after the taking of a vote of the creditors has been confirmed by the District Court and that both these actions of the court below were

[1] In this connection, it is our understanding that the Life Insurance Group and Mutual Savings Bank Group are filing an answer to the motion of the Debtor in which it is contended that payment of the Reconstruction Finance Corporation claim would leave insufficient cash for the operation of the Dector's railroad and the consummation of the plan.

affirmed by the Circuit Court of Appeals. Section 77 (f) of the Bankruptcy Act (11 U. S. C. § 205) provides that "upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." In view of the status of the present case, therefore, it would be wholly illogical for this Court to include in an order of affirmance a provision suggesting the treatment of the claim of any particular creditor or class of creditors in a manner different from that provided in the approved and confirmed plan.

Under these circumstances the extended discussion of the claim of Reconstruction Finance Corporation by the Debtor in the brief in support of its motion is perhaps to be regarded as a basis for a contention, in the possible event of a later hearing on the merits, that an excessive amount of new securities has been in some way allocated to Reconstruction Finance Corporation under the plan.[2]

[2] In a similar light must be viewed the suggestion of the Debtor (brief p. 6) that the Debtor's assets on October 31, 1942, were greater than on February 29, 1940, by $53,361,041, of which $47,458,147.44 constituted an increase in current as-

The contention of the Debtor is sought to be supported by a computation in which it (i) treats the approximately 232,000 shares of new common stock without par value allocated to Reconstruction Finance Corporation as actually worth $100 per share, as well as treating the income bonds and preferred stock so allocated as worth par, and (ii) adds into "the grand total of securities" stated to be allocated to Reconstruction Finance Corporation *both* $25,000,000 principal amount of 15 year secured notes *and* $49,883,800 (face amount) of collateral to be pledged to secure such notes. A sufficient answer was given by the District Court, in approving the carefully considered treatment of Reconstruction Finance Corporation's claim by the Interstate Commerce Commission, to an identical contention made before it: "The treatment of the Reconstruction Finance Corporation proves noth-

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sets, particularly cash, and that "it follows that the maximum capitalization provided for in the plan of reorganization should be increased at least by the increase in assets of $53,361,041." Naturally, barring a rehabilitation or improvement program by which the increase is sometimes expended, the assets, and particularly the cash or other current assets, of a railroad debtor in reorganization will tend to increase, for the simple reason that the debtor is not paying its bond interest and other indebtedness. Examination of Appendix C to the Debtor's own brief in support of its motion will show (sheet 2, line 43) that total corporate surplus on February 29, 1940, was a debit item of $43,363,193.55 and on October 31, 1942, a debit item of $46,770,135.89. In other words, by whatever amount assets had increased during this period, liabilities had increased by an amount approximately $3,400,000 greater.

ing whatsoever as to the value of the new securities except that the Commission believes that the new securities allotted to the Reconstruction Finance Corporation could not be liquidated for an amount in excess of the Reconstruction Finance Corporation claim" (35 F. Supp. 230, 243; R. 5022–5023). The Circuit Court of Appeals, in affirming the decision of the District Court, stated with reference to the treatment of Reconstruction's claim: "Our conclusion is that there was discrimination here, but it was against, rather than in favor of the R. F. C. It is the R. F. C. which has legitimate grounds for complaint" (126 F. (2d) 351, 369).

In this connection also the Debtor (brief pp. 10–12) attempts to convert an action of the Board of Directors of Reconstruction Finance Corporation, expressly conditioned upon the present plan of reorganization being finally confirmed and upon a request by the reorganization managers or the reorganized company, into an agreement at all times and under all circumstances to accept less than the actual full amount of Reconstruction's claim. As appears upon its face, the action referred to was taken in the hope of facilitating the early consummation of the proposed plan of reorganization of the Debtor then already approved by the Commission. Should that hope be frustrated all parties, including Reconstruction Finance Corporation, are entitled to their full original rights. And surely the Debtor of all parties is in no position to contend

that Reconstruction Finance Corporation is not entitled to the interest which the Debtor itself promised to pay when the money was borrowed. As stated at the outset of this memorandum the correct amount of the secured claim of Reconstruction Finance Corporation, with interest to the effective date of the plan (January 1, 1939), is $49,184,905.

III

Wherefore, Reconstruction Finance Corporation states that in the event such inclusion should in the judgment of this Court be desirable it has no objection to the inclusion in the record of such of the material submitted by the Debtor as contains or purports to contain statements of existing fact, but submits that except to the extent just stated the motion of the Debtor should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
JAMES L. HOMIRE,
Special Counsel,
EMMET MCCAFFERY,
Counsel,
Reconstruction Finance Corporation.

JANUARY 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1942

JAN 8 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NOS. 62, 63 AND 64

IN THE MATTER

OF

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

IRVING TRUST COMPANY, as Successor Trustee under the First Mortgage of Milwaukee and State Line Railway Company,

Petitioner,

against

MUTUAL SAVINGS BANK GROUP COMMITTEE, LIFE INSURANCE GROUP COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

HAROLD C. MCCOLLOM,
Attorney for Petitioner,
One Wall Street,
New York, New York.

Dated: New York, January 7, 1943.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-2343

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

Nos. 62, 63 and 64

In the Matter

of

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Debtor.

IRVING TRUST COMPANY, as Successor Trustee under the First Mortgage of Milwaukee and State Line Railway Company,

Petitioner,

against

MUTUAL SAVINGS BANK GROUP COMMITTEE, LIFE INSURANCE GROUP COMMITTEE, *et al.*,
Respondents.

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

In view of the motion and briefs which have been filed recently in Nos. 34, 35 and 36, Irving Trust Company, as Trustee under the First Mortgage of Milwaukee and State

Line Railway Company, petitioner in Nos. 62, 63 and 64 (hereinafter called the State Line Trustee), deems it advisable to file this supplemental memorandum.

Nos. 34, 35 and 36, wherein Chicago and North Western Railway Company, Debtor, is petitioner, involve some of the same orders which are involved in the State Line Trustee's petition, Nos. 62, 63 and 64; and both petitions are based on the same printed record.

The State Line Trustee takes no position with respect to the motion made by the petitioner in Nos. 34, 35 and 36, to supplement the record.

Our purpose in this memorandum is to call the Court's attention to the fact that different issues are involved in the State Line Trustee's petition from those raised by the Debtor's petition; and that, even if this Court should grant the request in the brief of the Group Committees, dated December 29, 1942, that the petition for certiorari in Nos. 34, 35 and 36 be denied, the petition of the State Line Trustee still requires separate action and consideration.

The nature of the issues in the State Line Trustee's petition and their lack of any similarity to those presented by the Debtor's petition, or by the cases under Section 77 which the Court now has under advisement, appears from the statement of the main question contained in the State Line Trustee's petition (pp. 18-19), as follows:

> "Where divisional bondholders, secured by a first lien on a specific part of the Debtor's property, do not cast the requisite two-thirds vote in favor of the plan of reorganization, and the appellate judges 'confess to the existence of a doubt' as to the fairness of the treatment accorded to such bondholders by the Plan, was the appellate court justified in holding that the rejection of the Plan

by the divisional bondholders 'is not reasonably justified in the light of the rights and interests of those rejecting it and all the relevant facts' (Bankruptcy Act, Section 77e) because

(a) all other classes of creditors have approved the Plan, and

(b) the Plan benefits all the creditors 'considering them together', and

(c) the divisional bondholders would allegedly be benefited by the greater marketability of and more certain interest payments on their new securities if the Plan should be consummated?''

The other questions relating to Section 77 of the Bankruptcy Act, which are referred to in the State Line Trustee's petition (pp. 19-22), refer to three general subject-matters:

(1) The Court's preliminary determination of the fairness of the Plan for submission to the creditors, with particular reference to the rules applicable to a divisional mortgage;

(2) The State Line Trustee's claim to the net income of the mortgaged property; and

(3) The Court's confirmation of the Plan after it had failed of acceptance by the State Line bondholders.

Petitioner submits that, irrespective of this Court's decision upon the motion to supplement the record in Nos. 34, 35 and 36 and upon the petitions for certiorari therein, and regardless of what disposition this Court may make of the pending cases relating to the *Western Pacific* and *Milwaukee* railroad reorganizations, the petition of the

State Line Trustee raises other important questions of Federal law which should be decided by this Court, and that the petition for certiorari in Nos. 62, 63 and 64 should be granted.

Dated: New York, January 7, 1943.

HAROLD C. MCCOLLOM,
Attorney for Irving Trust Company, as Successor Trustee under the First Mortgage of the Milwaukee and State Line Railway Company.

ORRIN G. JUDD,
Of Counsel.

FILED
FEB 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

MOTION FURTHER TO SUPPLEMENT RECORD.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor, Petitioner.

February 23, 1943.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

MOTION FURTHER TO SUPPLEMENT RECORD.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned counsel for the Chicago and North Western Railway Company, Debtor, petitioner in the above-entitled cases, respectfully make the following motion on behalf of said petitioner:

That a certified copy of the balance sheet stating assets and liabilities of the Debtor, Chicago and North Western

Railway Company, as of December 31, 1942, and of the income account, stating revenues and expenses of said Debtor for the calendar year 1942, as filed with and certified by the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, the said balance sheet and said income account respectively having been filed therein by Charles M. Thomson, Trustee of said Debtor's estate on February 13 and February 20, 1943, be made part of the record in these proceedings to be considered in connection with said Debtor's petition for writs of certiorari in these proceedings. A copy of said balance sheet of the Debtor as of December 31, 1942, is attached as Appendix A hereto; a copy of the income account for the calendar year 1942 is attached hereto as Appendix B.

HELEN W. MUNSERT,

LUTHER M. WALTER,

Attorneys for Chicago and North Western Railway Company, Debtor,

Petitioner.

Dated at Chicago, Illinois,
February 23, 1943.

BRIEF IN SUPPORT OF MOTION.

On December 22, 1942, a similar motion to supplement the record was made by counsel on behalf of the Debtor herein by filing a certified copy of the balance sheet as of October 31, 1942, and summary of revenues and expenses for the month of October, 1942. The purpose of this second motion is to bring the record down to the end of the calendar year 1942. It will be noted that the financial condition of Debtor's estate has substantially improved during the last two months of 1942.

On page 9 of the brief in support of the motion to supplement the record filed on December 22, 1942, is shown a statement of the current assets account of Debtor's estate as of October 31, 1942. The following table shows a comparison of the account as of October 31, 1942, and as of December 31, 1942.

			October 31, 1942			December 31, 1942
(708)	Cash		$37,456,382			$40,227,077
(709)	Temporary cash investments		10,776,181			17,226,181
(711)	Special deposits		7,842,119			6,986,251
	Total		$56,074,682			$64,439,509
(712)	Loans and bills receivable	$ 900		$ 1,000		
(714)	Net balance receivable from agents and conductors (cash in transit, etc.)	3,407,086		3,109,687		
(715)	Miscellaneous accounts receivable (including large government freight and passenger accounts)	6,149,843		7,235,559		
(716)	Material and supplies on hand	10,090,898		9,664,241		
(717)	Interest and dividends receivable	63,811		60,248		
(719)	Other current assets	204,467	19,917,005	289,835		20,360,570
	TOTAL CURRENT ASSETS		$75,991,687			$84,800,079

It will be noted from the foregoing comparison that the cash and cash-equivalent items as of December 31, 1942, has increased in the amount of $8,364,827; the total increase of current assets in the two-month period is $8,808,392. Debtor's estate, as of December 31, 1942, has ample funds to pay off the indebtedness to the Reconstruction Finance Corporation, at that date principal and interest at 4 per cent amounting to $48,322,687, and still have ample working capital to maintain and operate the property of the Debtor now in control of the Trustee.

Confirming the statement in Appendix B to the motion of December 22, 1942, of Debtor's comptroller estimating that the items of cash, temporary cash investments, and special deposits, which aggregated on November 30, 1942, the sum of $59,575,918, would exceed $60,000,000 on December 31, 1942, it now appears, as shown in Appendix A hereto, that the three items on December 31, 1942, aggregated $64,439,509, substantially in excess of the comptroller's estimate.

While it was stated in Appendix B to Debtor's motion of December 22, 1942, that Debtor's comptroller estimated that income available for fixed charges, but before income taxes, for the calendar year 1942 would approximate $32,200,000, it now appears (see Appendix B hereto) from actual results of operation for 1942 that income available for fixed charges, before income taxes, is $35,742,316.

There can be no question but that the condition of

Debtor's estate, as shown by the balance sheet and the income account, is now vastly different from that which existed at the time the Commission and the District Court approved the plan of reorganization.

In the brief in support of the motion to supplement the record of December 22, 1942, we cited a number of authorities to support the proposition that this Court may properly consider changed conditions. In addition to the cases there cited, we call attention to *United States* v. *Swift & Co.*, 286 U. S. 106, 76 L. ed. 999, wherein this Court held that a court of equity has power to modify a decree in an adaptation to changed conditions. We quote from the decision of the Court (286 U. S. 114-5; L. ed. 1005-06):

> "Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative * * *. The result is all one whether the decree has been entered after litigation

> or by consent * * *. In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

The plan of reorganization has not yet become effective and the final judicial act with reference to the plan of reorganization must make that plan of reorganization respond to conditions as of the date of final decree.

Granting for the purposes of argument that the conditions affecting the Commission's estimate of earnings of the Debtor's property might have justified the Commission in certifying the plan of reorganization here under attack, it is now certain that the conditions then existing no longer exist. The estimate of the Commission of maximum income available for fixed charges in the normal year is $14,625,000 (Tr. 3518); last year's income, before income taxes, was more than $35,700,000. To permit the plan of reorganization to become effective would be to subject junior creditors and stockholders to substantial wrong.

The record should be supplemented by the facts embraced in this motion and in the prior motion, and, in the light of the record thus supplemented, there should be no difficulty (a) in finding the plan of reorganization not just and reasonable, or (b) in remanding the proceedings to the District Court with directions to the Commission

to certify a plan of reorganization reflecting conditions at the present time.

Respectfully submitted,

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor,
Petitioner.

Dated at Chicago, Illinois, this 23rd day of February, 1943.

APPENDIX A.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

In Proceedings for the Reorganization of a Railroad.

In the Matter of
Chicago and North Western Railway Company,
Debtor. } No. 60448

STATEMENT OF ASSETS AND LIABILITIES OF DEBTOR AS OF DECEMBER 31, 1942 AND SUMMARY OF REVENUES AND EXPENSES OF DEBTOR FOR THE MONTH OF DECEMBER, 1942.

TO THE CLERK OF SAID COURT:

Pursuant to Section 7 of Order No. 1, entered herein on June 28, 1935, I submit herewith a statement of the assets and liabilities of the Debtor as of December 31, 1942, together with a statement showing revenues and expenses of the Debtor for the month of December, 1942. Said statements are certified as correct by the chief accounting officer of the Debtor.

CHARLES M. THOMSON,
Trustee of the property of Chicago and North Western Railway Company.

Dated: February 12, 1943.

Filed: February 13, 1943.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

CHARLES M. THOMSON, TRUSTEE

BALANCE SHEET — DECEMBER 31, 1942

ASSETS	Prior	Current	Total
INVESTMENTS:			
(701) Road and equipment property	$544,598,212.32	Cr. $ 12,542,828.62	$532,055,383.70
(702) Improvements on leased property	376,868.91	Cr. 45,337.45	331,531.46
(704) Deposits in lieu of mortgaged property sold	—	145,600.29	145,600.29
(704½) Maintenance funds	—	550,000.00	550,000.00
(705) Miscellaneous physical property	13,513,931.88	440,652.92	13,954,584.80
(706) Investment in affiliated companies—			
Stocks	27,244,538.67	60,000.00	27,304,538.67
Bonds	46,245,249.24	—	46,245,249.24
Advances	634,791.59	389,037.84	1,023,829.43
(707) Other investments—			
Stocks	3,910,575.93	220.00	3,910,795.93
Bonds	151,770.00	—	151,770.00
Miscellaneous	—	12,018.77	12,018.77
	$636,675,938.54	Cr. $ 10,990,636.25	$625,685,302.29
CURRENT ASSETS:			
(708) Cash	$ —	$ 40,227,076.59	$ 40,227,076.59
(709) Temporary cash investments	—	17,226,181.25	17,226,181.25
(711) Special deposits	$ 4,000.00	6,982,251.12	6,986,251.12
(712) Loans and bills receivable	—	1,000.00	1,000.00
(714) Net balance receivable from agents and conductors	—	3,109,686.94	3,109,686.94
(715) Miscellaneous accounts receivable	2,307.72	7,233,250.84	7,235,558.56
(716) Material and supplies	—	9,664,241.45	9,664,241.45
(717) Interest and dividends receivable	—	60,247.84	60,247.84
(719) Other current assets	Cr. 88.35	289,923.82	289,835.47
	$ 6,219.37	$ 84,793,859.85	$ 84,800,079.22
DEFERRED ASSETS:			
(720) Working fund advances	—	$ 27,367.07	$ 27,367.07
(722) Current account—assets—June 30, 1935, collected (See contra)	$ 33,513,452.90	—	—
(722) Prior account—liabilities—June 30, 1935, paid (See contra)	—	76,205,533.93	—
(722) Other deferred assets	9,839,054.04	923,219.18	10,762,273.22
	$ 43,352,506.94	$ 77,156,120.18	$ 10,789,640.29
UNADJUSTED DEBITS:			
(723) Rents and insurance premiums paid in advance	—	$ 75,318.56	$ 75,318.56
(727) Other unadjusted debits	47,596.27	2,076,549.62	2,124,145.89
	$ 47,596.27	$ 2,151,868.18	$ 2,199,464.45

Par Value of Holdings	
(728) Securities issued or assumed by respondent—Unpledged	$ 9,106,000.00
(729) Securities issued or assumed by respondent—Pledged	83,542,000.00
	$92,648,000.00

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

CHARLES M. THOMSON, TRUSTEE

BALANCE SHEET — DECEMBER 31, 1942

LIABILITIES		Prior	Current	Total
STOCK:				
(751) Capital stock		$180,835,300.00	—	$180,835,300.00
Scrip		4,545.25	—	4,545.25
(753) Premium on capital stock		29,657.75	—	29,657.75
		$180,869,503.00	—	$180,869,503.00
GOVERNMENTAL GRANTS:				
(754) Grants in aid of construction		$ 463,116.49	$ 2,510,833.79	$ 2,973,950.28
LONG TERM DEBT:				
(755) Funded debt unmatured	$373,391,000.00			
Less respondent's holdings	92,596,000.00	$280,795,000.00	—	$280,795,000.00
(755½) Long term debt in default		$ 71,714,251.67	—	$ 71,714,251.67
(756) Receivers' and Trustees' securities	$ 19,642,000.00			
Less respondent's holdings	52,000.00	$ 1,598,000.00	$ 17,992,000.00	$ 19,590,000.00
CURRENT LIABILITIES:				
(759) Traffic and car service balances—Cr.		$ 14.54	$ 6,835,139.13	$ 6,835,153.67
(760) Audited accounts and wages payable		3,344.43	5,441,812.69	5,445,157.12
(761) Miscellaneous accounts payable		86.51	185,538.30	185,624.81
(762) Interest matured unpaid		15,841.25	66,191.50	82,032.75
(763) Dividends matured unpaid		62,055.70	—	62,055.70
(764) Unmatured interest accrued		1,952,098.36	99,393.80	2,051,492.16
(767) Accrued tax liability		14,882.84	4,668,075.25	4,682,958.09
(768) Other current liabilities		5,000.00	3,231,363.49	3,236,363.49
		$ 2,053,323.63	$ 20,527,514.16	$ 22,580,837.79
DEFERRED LIABILITIES:				
(769½) Matured interest in default		$100,658,280.14	—	$100,658,280.14
(770) Current account—liabilities—June 30, 1935, paid (See contra)		76,205,533.93	—	—
(770) Prior account—assets—June 30, 1935, collected (See contra)		—	$ 33,513,452.90	—
(770) Other deferred liabilities		66,471.75	1,528,339.68	1,594,811.43
		$176,930,285.82	$ 35,041,792.58	$102,253,091.57
UNADJUSTED CREDITS:				
(772) Premium on funded debt		$ 376,213.02	$ 20,573.37	$ 396,786.39
(774) Maintenance reserves		—	547,450.00	547,450.00
(775) Accrued depreciation—Road		—	1,919,779.22	1,919,779.22
(775½) Accrued amortization of defense projects—Road		—	15,830.99	15,830.99
(776) Accrued depreciation—Equipment		62,843,454.35	12,010,471.79	74,853,926.14
(776½) Accrued amortization of defense projects—Equipment		—	569,216.58	569,216.58

	$636,675,938.54	Cr. $ 10,990,636.25	$625,685,302.29
CURRENT ASSETS:				
(708) Cash	$ —	$ 40,227,076.59	$ 40,227,076.59
(709) Temporary cash investments	—	17,226,181.25	17,226,181.25
(711) Special deposits	$ 4,000.00	6,982,251.12	6,986,251.12
(712) Loans and bills receivable	—	1,000.00	1,000.00
(714) Net balance receivable from agents and conductors	—	3,109,686.94	3,109,686.94
(715) Miscellaneous accounts receivable	2,307.72	7,233,250.84	7,235,558.56
(716) Material and supplies	—	9,664,241.45	9,664,241.45
(717) Interest and dividends receivable	—	60,247.84	60,247.84
(719) Other current assets	Cr. 88.35	289,923.82	289,835.47
	$ 6,219.37	$ 84,793,859.85	$ 84,800,079.22
DEFERRED ASSETS:			
(720) Working fund advances	—	$ 27,367.07	$ 27,367.07
(722) Current account—assets—June 30, 1935, collected (See contra)	$ 33,513,452.90	—	—
(722) Prior account—liabilities—June 30, 1935, paid (See contra)	—	76,205,533.93	—
(722) Other deferred assets	9,839,054.04	923,219.18	10,762,273.22
	$ 43,352,506.94	$ 77,156,120.18	$ 10,789,640.29
UNADJUSTED DEBITS:			
(723) Rents and insurance premiums paid in advance	—	$ 75,318.56	$ 75,318.56
(727) Other unadjusted debits	47,596.27	2,076,549.62	2,124,145.89
	$ 47,596.27	$ 2,151,868.18	$ 2,199,464.45
	Par Value of Holdings			
(728) Securities issued or assumed by respondent—Unpledged	$ 9,106,000.00			
(729) Securities issued or assumed by respondent—Pledged	83,542,000.00			
	$92,648,000.00			
	$680,082,261.12	$153,111,211.96	$723,474,486.25

NOTE: The following payments for redemption of debt and interest have been made since June 28, 1935:

	Cash Payments		By Application of Collateral Income	
	Month of Dec., 1942	Period June 28, 1935 to Dec. 31, 1942	Month of Dec., 1942	Period June 28, 1935 to Dec. 31, 1942
Redemption of debt:				
Equipment trust certificates	$180,000.00	$20,801,000.00	—	—
Bonds	—	26,500.00	—	—
R.F.C. (P.W.A. and Tie) loans	—	2,160,000.00	—	—
Railroad Credit Corporation	—	300,000.00	—	$1,120,893.00
Bank loans	—	659,199.00	—	—
	$180,000.00	$23,946,699.00	—	$1,120,893.00
Payment of interest:				
Equipment trust certificates	$ 19,507.50	$ 4,001,831.14	—	—
Bonds	32,780.25	13,741,594.00	—	—
R.F.C. (P.W.A. and Tie) loans	—	295,315.03	—	$ 1,994.52
R.F.C. (Other) loans	—	3,767,755.00	$106,400.00	3,698,600.48
Railroad Credit Corporation	—	1,751.66	—	64,942.79
Bank loans	—	395,520.00	—	625,500.00
	$ 52,287.75	$22,203,766.83	$106,400.00	$4,391,037.79
	$232,287.75	$46,150,465.83	$106,400.00	$5,511,930.79

(756)	Trustees' securities..... $ 19,642,000.00 Less respondent's holdings..... 52,000.00	$ 1,598,000.00	$ 17,992,000.00	$ 19,590,000.00
	CURRENT LIABILITIES:			
(759)	Traffic and car service balances—Cr.....	$ 14.54	$ 6,835,139.13	$ 6,835,153.67
(760)	Audited accounts and wages payable.....	3,344.43	5,441,812.69	5,445,157.12
(761)	Miscellaneous accounts payable...	86.51	185,538.30	185,624.81
(762)	Interest matured unpaid.....	15,841.25	66,191.50	82,032.75
(763)	Dividends matured unpaid.....	62,055.70	—	62,055.70
(764)	Unmatured interest accrued.....	1,952,098.36	99,393.80	2,051,492.16
(767)	Accrued tax liability.....	14,882.84	4,668,075.25	4,682,958.09
(768)	Other current liabilities.....	5,000.00	3,231,363.49	3,236,363.49
		$ 2,053,323.63	$ 20,527,514.16	$ 22,580,837.79
	DEFERRED LIABILITIES:			
(769½)	Matured interest in default.....	$100,658,280.14	—	$100,658,280.14
(770)	Current account—liabilities—June 30, 1935, paid (See contra).....	76,205,533.93	—	—
(770)	Prior account—assets—June 30, 1935, collected (See contra).....	—	$ 33,513,452.90	—
(770)	Other deferred liabilities.....	66,471.75	1,528,339.68	1,594,811.43
		$176,930,285.82	$ 35,041,792.58	$102,253,091.57
	UNADJUSTED CREDITS:			
(772)	Premium on funded debt.....	$ 376,213.02	$ 20,573.37	$ 396,786.39
(774)	Maintenance reserves.....	—	547,450.00	547,450.00
(775)	Accrued depreciation—Road.....	—	1,919,779.22	1,919,779.22
(775½)	Accrued amortization of defense projects—Road.....	—	15,830.99	15,830.99
(776)	Accrued depreciation—Equipment	62,843,454.35	12,010,471.79	74,853,926.14
(776½)	Accrued amortization of defense projects—Equipment.....	—	569,216.58	569,216.58
(778)	Other unadjusted credits.....	20,476.46	12,934,324.56	12,954,801.02
		$ 63,240,143.83	$ 28,017,646.51	$ 91,257,790.34
	CORPORATE SURPLUS:			
(779)	Additions to property through income and surplus.....	$ 3,222,501.26	Dr.$ 33,753.56	$ 3,188,747.70
(784)	Profit and loss.....	Dr. 100,803,864.58	49,055,178.48	Dr. 51,748,686.10
		Dr.$ 97,581,363.32	$ 49,021,424.92	Dr.$ 48,559,938.40
		$680,082,261.12	$153,111,211.96	$723,474,486.25

CORRECT:

(Signed) C. H. WESTBROOK,
Comptroller.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

CHARLES M. THOMSON, TRUSTEE

INCOME ACCOUNT — MONTH OF DECEMBER, 1942

	Prior	Current	Total
I. OPERATING INCOME			
Railway operating income:			
Operating revenues—			
Freight	Dr. $ 2,494.38	$ 8,727,361.82	$ 8,724,867.44
Passenger	Dr. 39.69	2,303,607.14	2,303,567.45
Mail	—	258,625.79	258,625.79
Express	—	428,688.71	428,688.71
Miscellaneous	Dr. 19.30	479,303.97	479,284.67
Incidental	Dr. 118.72	242,770.15	242,651.43
Joint facility — Net	—	Dr. 422.74	Dr. 422.74
Total operating revenues	Dr. $ 2,672.09	$12,439,934.84	$12,437,262.75
Operating expenses—			
Maintenance of way and structures	$ 582.52	$ 1,456,631.13	$ 1,457,213.65
Maintenance of equipment	26.66	2,161,778.93	2,161,805.59
Traffic	—	180,017.63	180,017.63
Transportation	26.67	3,941,603.31	3,941,629.98
Miscellaneous	—	121,316.84	121,316.84
General	—	300,338.85	300,338.85
Total operating expenses	$ 635.85	$ 8,161,686.69	$ 8,162,322.54
NET REVENUE FROM RAILWAY OPERATIONS	Def. $ 3,307.94	$ 4,278,248.15	$ 4,274,940.21
Railway tax accruals	Cr. $ 191,014.49	$ 2,577,494.39	$ 2,386,479.90
RAILWAY OPERATING INCOME	$ 187,706.55	$ 1,700,753.76	$ 1,888,460.31
Rent income:			
Rent from locomotives	—	$ 28,472.08	$ 28,472.08
Rent from passenger-train cars	—	44,631.66	44,631.66
Rent from work equipment	—	642.27	642.27
Joint facility rent income	—	23,760.08	23,760.08
Total rent income	—	$ 97,506.09	$ 97,506.09

	Prior	Current	Total
Rents payable:			
Hire of freight cars — Debit balance	—	$ 141,865.36	$ 141,865.36
Rent for locomotives	—	8,304.91	8,304.91
Rent for passenger-train cars	—	17,372.07	17,372.07
Rent for work equipment	—	32.72	32.72
Joint facility rents	—	47,089.01	47,089.01
Total rents payable	—	$ 214,664.07	$ 214,664.07
NET RENTS	—	$ 117,157.98	$ 117,157.98
NET RAILWAY OPERATING INCOME	$ 187,706.55	$ 1,583,595.78	$ 1,771,302.33
II OTHER INCOME			
Miscellaneous rent income	—	$ 43,338.51	$ 43,338.51
Miscellaneous nonoperating physical property	—	32,280.72	32,280.72
Dividend income	—	215,950.40	215,950.40
Income from funded securities	—	17,378.08	17,378.08
Income from unfunded securities and accounts	$ 82,417.26	8,719.66	91,136.92
Release of premiums on funded debt	715.72	580.30	1,296.02
Miscellaneous income	—	440.00	440.00
Total other income	$ 83,132.98	$ 318,687.67	$ 401,820.65
Total income	$ 270,839.53	$ 1,902,283.45	$ 2,173,122.98
III MISCELLANEOUS DEDUCTIONS FROM INCOME			
Miscellaneous rents	—	$ 2,231.10	$ 2,231.10
Miscellaneous tax accruals	—	1,553.10	1,553.10
Miscellaneous income charges	—	Cr. 343.54	Cr. 343.54
Total miscellaneous deductions	—	$ 3,440.66	$ 3,440.66
IV OTHER DEDUCTIONS — None			
INCOME AVAILABLE FOR FIXED CHARGES	$ 270,839.53	$ 1,898,842.79	$ 2,169,682.32
V FIXED CHARGES			
Interest on funded debt	$1,324,169.44	$ 50,790.08	$ 1,374,959.52
Interest on unfunded debt	—	20,808.11	20,808.11
Total fixed charges	$1,324,169.44	$ 71,598.19	$ 1,395,767.63
NET INCOME	Def. $1,053,329.91	$ 1,827,244.60	$ 773,914.69

CORRECT:
(Signed) C. H. WESTBROOK,

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
EASTERN DIVISION.

C. H. Westbrook, first upon oath being duly sworn, says that he is the chief accounting officer, to-wit, Comptroller of Chicago and North Western Railway Company, Debtor herein; that the attached and foregoing statement of assets and liabilities of the Debtor as of December 31, 1942, and the statement showing revenues and expenses of the Debtor for the month of December, 1942, are true and correct as shown by the books and accounts of said Debtor.

C. H. WESTBROOK.

Subscribed and sworn to before me this 12th day of February, 1943.

P. J. SESTERHENN,
Notary Public.
My Commission Expires May 6, 1946.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Statement of Assets and Liabilities of Debtor as of December 31, 1942 and Summary of Revenues and Expenses of Debtor for the Month of December, 1942 filed February 13th, 1943 In the Matter of

Chicago and North Western Railway
Company, Debtor,
No. 60448

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago this 20th day of February, A. D. 1943.

(Seal)

ROY H. JOHNSON,
Clerk.
By ARTHUR E. CLAUSSEN,
Deputy Clerk.

APPENDIX B.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Proceedings for the Reorganization of a Railroad.

In the Matter of
Chicago and North Western Railway Company,
Debtor. } No. 60448.

INCOME ACCOUNT STATEMENT SHOWING REVENUES AND EXPENSES FOR THE YEAR ENDED DECEMBER 31, 1942.

TO THE CLERK OF SAID COURT:

This income account statement for the year ended December 31, 1942, is filed to supplement the monthly income account statements for that year filed pursuant to Section 7 of Order No. 1, entered herein on June 28, 1935. Said statement is certified as correct by the Chief Accounting Officer of the Debtor.

CHARLES M. THOMSON,
Trustee of the property of Chicago and North Western Railway Company.

Dated: February 20, 1943.

Filed: February 20, 1943.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
CHARLES M. THOMSON, TRUSTEE
INCOME ACCOUNT — YEAR ENDED DECEMBER 31, 1942

	Prior	Current	Total
I. OPERATING INCOME			
Railway Operating Income:			
Operating Revenues—			
Freight	Dr. $ 15,634.75	$105,613,319.19	$105,597,684.44
Passenger	Dr. 7.74	20,382,910.53	20,382,902.79
Mail	—	2,611,318.79	2,611,318.79
Express	—	3,161,999.15	3,161,999.15
Miscellaneous	Dr. 40.30	4,543,697.67	4,543,657.37
Incidental	Dr. 1,861.47	3,599,823.15	3,597,961.68
Joint Facility — net	—	Dr. 1,500,504.86	Dr. 1,500,504.86
Total Operating Revenues	Dr. $ 17,544.26	$138,412,563.62	$138,395,019.36
Operating Expenses:			
Maintenance of Way and Structures	1,468.50	18,268,830.71	18,270,299.21
Maintenance of Equipment	401.63	23,758,293.77	23,758,695.40
Traffic	—	2,339,463.63	2,339,463.63
Transportation	4,607.02	45,208,438.12	45,213,045.14
Miscellaneous	—	1,277,419.13	1,277,419.13
General	—	3,482,879.40	3,482,879.40
Total Operating Expenses	$ 6,477.15	$ 94,335,324.76	$ 94,341,801.91
NET REVENUE FROM RAILWAY OPERATIONS	Def. $ 24,021.41	$ 44,077,238.86	$ 44,053,217.45
Railway Tax Accruals	Cr. 191,014.49	17,330,632.61	17,139,618.12*
RAILWAY OPERATING INCOME	$ 166,993.08	$ 26,746,606.25	$ 26,913,599.33
Rent Income:			
Rent from Locomotives	—	109,441.55	109,441.55
Rent from Passenger-train Cars	—	467,223.53	467,223.53
Rent from Work Equipment	—	8,318.99	8,318.99
Joint Facility Rent Income	—	383,242.97	383,242.97
Total Rent Income	—	968,227.04	968,227.04
Rents Payable:			
Hire of Freight Cars—Debit Balance	—	2,117,856.00	2,117,856.00
Rent for Locomotives	—	51,760.31	51,760.31
Rent for Passenger-train Cars	—	195,431.53	195,431.53
Rent for Work Equipment	—	384.08	384.08
Joint Facility Rents	Cr. 194.48	576,589.65	576,395.17
Total Rents Payable	Cr. 194.48	2,942,021.57	2,941,827.09
NET RENTS	Cr. $ 194.48	$ 1,973,794.53	$ 1,973,600.05
NET OPERATING INCOME	$ 167,187.56	$ 24,772,811.72	$ 24,939,999.28
II. OTHER INCOME			
Income from Lease of Road and Equipment	—	1,557.25	1,557.25
Miscellaneous Rent Income	—	565,491.07	565,491.07
Miscellaneous Nonoperating Physical Property	—	300,810.74	300,810.74
Dividend Income	—	514,556.00	514,556.00
Income from Funded Securities	—	138,389.57	138,389.57
Income from Unfunded Securities and Accounts	82,417.26	35,940.13	118,357.39
Release of Premiums on Funded Debt	8,870.35	4,801.99	13,672.34
Miscellaneous Income	—	1,163.00	1,163.00
Total Other Income	$ 91,287.61	$ 1,562,709.75	$ 1,653,997.36
Total Income	$ 258,475.17	$ 26,335,521.47	$ 26,593,996.64
III. MISCELLANEOUS DEDUCTIONS FROM INCOME			
Miscellaneous Rents	—	16,734.64	16,734.64
Miscellaneous Tax Accruals	—	140,653.10	140,653.10
Miscellaneous Income Charges	10,437.58	21,176.93	31,614.51
Total Miscellaneous Deductions	$ 10,437.58	$ 178,564.67	$ 189,002.25
INCOME AVAILABLE FOR FIXED CHARGES	$ 248,037.59	$ 26,156,956.80	$ 26,404,994.39
IV. FIXED CHARGES			
Rent for Leased Roads and Equipment	—	663.48	663.48
Interest on Funded Debt	15,902,374.72	465,835.40	16,368,210.12
Interest on Unfunded Debt	1,619.97	70,261.42	71,881.39
Total Fixed Charges	$15,903,994.69	$ 536,760.30	$ 16,440,754.99
NET INCOME	Def. $15,655,957.10	$ 25,620,196.50	$ 9,964,239.40

*Includes accruals for
Federal Income Tax — $9,337,321.90

CORRECT:
(Signed) C. H. WESTBROOK
Comptroller.

February 19, 1943.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
EASTERN DIVISION.

C. H. Westbrook, first upon oath being duly sworn, says that he is the chief accounting officer, to-wit, Comptroller of Chicago and North Western Railway Company, Debtor herein; that the attached and foregoing income account statement showing revenues and expenses for the year ended December 31, 1942, is true and correct as shown by the books and accounts of said Debtor.

C. H. WESTBROOK.

Subscribed and sworn to before me this 19th day of February, 1943.

P. J. SESTERHENN,
Notary Public.

My Commission Expires May 6, 1946.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Income Account Statement showing Revenues and Expenses for the Year Ended December 31, 1942, filed February 20th, 1943 In the Matter of

Chicago and North Western
Railway Company,
Debtor—No. 60448.

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago this 20th day of February, A. D. 1943.

ROY H. JOHNSON,
Clerk.

(Seal)

By ARTHUR E. CLAUSSEN,
Deputy Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

SECOND MOTION FURTHER TO SUPPLEMENT THE RECORD.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned counsel for the Chicago and North Western Railway Company, Debtor, petitioner in the above-entitled cases, respectfully make the following motion on behalf of said petitioner:

That the following documents be made a part of the

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

SECOND MOTION FURTHER TO SUPPLEMENT THE RECORD.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned counsel for the Chicago and North Western Railway Company, Debtor, petitioner in the above-entitled cases, respectfully make the following motion on behalf of said petitioner:

That the following documents be made a part of the

record in these proceedings: (1) a certified copy of the combined balance sheet stating assets and liabilities of the Debtor, Chicago and North Western Railway Company, and of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (a wholly owned subsidiary), as of December 31, 1942; (2) a certified copy of the combined income account stating revenues and expenses of the said Debtor and said subsidiary for the calendar year 1942; (3) a statement of assets and liabilities of Debtor as of January 31, 1943, and summary of revenues and expenses of the Debtor for the month of January, 1943, as filed with and certified by the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, the said statement and summary having been filed therein by Charles H. Thomson, Trustee of said Debtor's estate on March 10, 1943; and (4) a statement of cash, temporary investments, and special deposits of the Debtor as of March 18, 1943, the same to be considered in connection with said Debtor's petition for writs of certiorari in these proceedings. Documents 1, 2, and 4 are certified as "correct" by C. H. Westbrook, Comptroller of Debtor's estate. Copy of said combined balance sheet is attached as Appendix A hereto; copy of said combined income account, as Appendix B hereto; copy of said statement of assets and liabilities and of said summary of revenues and expenses as of January 31, 1943, as Appendix C; and copy of said statement of cash, etc., of March 18, 1943, as Appendix D.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor,
Petitioner,

Dated at Chicago, Illinois,
March 24, 1943.

BRIEF IN SUPPORT OF MOTION.

On December 22, 1942, motion was made herein to supplement the record by filing a certified copy of the Debtor's balance sheet as of October 31, 1942, and summary of revenues and expenses for the month of October, 1942. On February 23, 1943, a similar motion was made to supplement the record by filing a certified copy of the balance sheet of the Debtor as of December 31, 1942, and of the income account for the calendar year 1942. The present motion is to supplement the record by filing (a) a certified copy of the combined balance sheet as of December 31, 1942, for the Debtor and its wholly owned subsidiary, Chicago, St. Paul, Minneapolis and Omaha Railway Company (not in reorganization), as of December 31, 1942; (b) the combined income account, being a summary of revenues and expenses of said carriers constituting Debtor's system, for the calendar year 1942; (c) a statement of the assets and liabilities of the Debtor as of January 31, 1943, and statement of revenues and expenses of the Debtor for the month of January, 1943; and (d) a statement of cash, temporary cash investments, and special deposits of the Debtor as of March 18, 1943.

In the Motion Further to Supplement the Record of February 23, 1943, we included in Appendix B the income account of the Debtor's estate for the year ended December 31, 1942; in Appendix B hereto we show the income account for the Debtor and its wholly owned subsidiary combined, for the year ending December 31, 1942. The following table is a comparison of the income account of the Debtor and of the system, showing in the final column the additional amount of said items resulting from com-

bining the two properties of the system, over the same items for the Debtor's estate alone, for the calendar year 1942.

INCOME ACCOUNT FOR 1942

	C.&N.W.	System	Additional
I. Operating Income			
Operating Revenue	$138,395,019	$162,125,143	$23,730,124
Operating Expenses	94,341,802	111,999,862	17,658,062
Net Revenue from Ry. Operations	$ 44,053,217	$ 50,125,281	$ 6,072,064
Railway Tax Accruals	17,139,618	18,657,521	1,517,903
Railway Operating Income	$ 26,913,599	$ 31,467,760	$ 4,554,161
Net Rents (Payable) Dr.	1,973,600	3,346,439	1,372,839
Net Railway Operating Income	$ 24,939,999	$ 28,121,321	$ 3,181,322
II. Other Income			
Total Other Income	1,653,997	1,717,314	63,317
Total Income	$ 26,593,996	$ 29,838,635	$ 3,244,639
III. Miscellaneous Deductions from Income			
Total Misc. Deductions	189,002	195,442	6,440
Income available for fixed charges	$26,404,994	$ 29,643,193	$ 3,238,199
Income available for fixed charges before income taxes*	35,742,316	38,980,515	3,238,199

* Includes accruals for federal income tax, $9,337,322, shown in Appendix B, Motion Further to Supplement the Record, February 23, 1943.

We think it particularly important to note the results of operation for the system because securities of the Debtor's subsidiary are pledged as collateral for the loan made by the Reconstruction Finance Corporation, and for the new secured notes in the approximate amount of $25,000,000. All of the First Mortgage, Series A, 5 Per Cent Bonds in the amount of $45,186,000 are collateral with other securities as provided in the Commission's plan, to secure Reconstruction Finance Corporation 15-

Year Notes. One of the principal reliefs sought in this proceeding by the Debtor corporation is readjustment of the participation by Reconstruction Finance Corporation in the plan of reorganization, and particularly the Debtor requests that the loan from the Reconstruction Finance Corporation be paid off in whole or in part in cash, with release of the securities of the new company allocated to Reconstruction Finance Corporation under the plan, and modification of the plan by the Commission to give effect to such payment. It will be noted from the foregoing table that net revenue from railway operations of the system is greater than for the Debtor alone, in the sum of $6,072,064, and that income available for fixed charges before income taxes for the system is $38,980,515, or $3,238,199 greater than the same item for the Debtor alone.

The following table is a comparison of three items of the current assets of the Debtor's estate as of December 31, 1942,[1] and March 18, 1943,[2] with the statement of the increase between said dates in said cash items:

CURRENT ASSETS	Dec. 31, 1942	Mar. 18, 1943	Increase
(708) Cash	$40,227,077	$48,046,944	$ 7,819,867
(709) Temporary Cash Investments	17,226,181	21,226,181	4,000,000
(711) Special Deposits	6,982,251	6,619,404	362,847*
Total	$64,435,509	$75,892,529	$11,457,020

* Decrease

It will be noted from the foregoing table that the cash, available for immediate use, increased during the period ending March 18, 1943, in the amount of $11,457,020.

In the following table we show a statement for the Debtor combined with its wholly owned subsidiary, Chi-

[1] Appendix A, Motion Further to Supplement Record, February 23, 1943.

[2] Appendix D hereto.

cago, St. Paul, Minneapolis and Omaha Railway Company, as of December 31, 1942, and as of March 18, 1943, the latter being computed by adding the increase in the three cash accounts in the current assets of the Debtor as shown above to the said items for the system as shown in Appendix A hereto:

	Dec. 31, 1942†	Mar. 18, 1943
(708) Cash	$45,570,567	$53,390,434
(709) Temporary Cash Investments	17,226,181	21,226,181
(711) Special Deposits	7,092,126	6,725,279
Total	$69,888,874	$81,341,894

† Taken from Appendix A hereto.

It will be noted that system cash available on March 18, 1943, was $81,341,894. After paying the indebtedness to the Reconstruction Finance Corporation, which as of December 31, 1942, principal and interest at four per cent, amounted to $48,322,687, there would be left in cash the sum of $33,019,207. There would still remain ample working capital to maintain and operate the properties of the Debtor now in control of the Trustee.

We have asked this Court to note the marked improvement in the financial condition of the Debtor and of the Debtor's system, so as to show clearly that there has been such a change in financial position determining a fair and equitable plan of reorganization as to warrant remanding the proceedings to the Commission with directions to consider whether the plan of reorganization should be modified so as (a) to permit payment, in whole or in part, of the debt to the Reconstruction Finance Corporation, (b) to require a change in the effective date of the plan, and consequent modification in such plan of reorganization, and (c) to allow strengthening the securities given to the

creditors already provided for in the plan, further allotment of securities to the holders of convertible bonds of 1949, and possible participation of preferred and common stockholders.

Respectfully submitted,

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor,
Petitioner.

Dated at Chicago, Illinois, this 24th day of March, 1943.

APPEN

CHICAGO AND NORTH WE
(C. & N. W. Ry. Co.—C.

Balance Sheet—D

ASSETS

INVESTMENTS:		
(701) Road and equipment property		$621,134,079
(702) Improvements on leased property		331,531
(704) Deposits in lieu of mortgaged property sold		145,600
(704½) Maintenance funds		656,218
(705) Miscellaneous physical property		14,206,259
(706) Investment in affiliated companies—		
Stocks		4,028,385
Bonds		68,000
Advances		1,056,731
(707) Other investments—		
Stocks		3,910,798
Bonds		151,770
Miscellaneous		13,260
Total investments		$645,702,629
CURRENT ASSETS:		
(708) Cash		$ 45,570,567
(709) Temporary cash investments		17,226,181
(711) Special deposits		7,092,126
(712) Loans and bills receivable		1,000
(714) Net balance receivable from agents and conductors		3,561,414
(715) Miscellaneous accounts receivable		8,031,712
(716) Material and supplies		11,474,526
(717) Interest and dividends receivable		59,741
(719) Other current assets		346,611
Total current assets		$ 93,363,878
DEFERRED ASSETS:		
(720) Working fund advances		$ 30,476
(722) Other deferred assets		981,315
Total deferred assets		$ 1,011,791
UNADJUSTED DEBITS:		
(723) Rents and insurance premiums paid in advance		$ 85,394
(727) Other unadjusted debits		2,583,525
	Par Value of Holdings	
(728) Securities issued or assumed by respondent—unpledged	$ 10,111,000	
(729) Securities issued or assumed by respondent—pledged	123,792,000	
	$133,903,000	
Total unadjusted debits		$ 2,668,919
Grand total		$742,747,217

DIX A.

STERN RAILWAY SYSTEM
St. P. M. & O. Ry. Co.)
ecember 31, 1943

LIABILITIES		
STOCK:		
(751) Capital stock		$182,725,367
(751) Scrip		4,545
(752) Stock liability for conversion		2,879
(753) Premium on capital stock		29,658
Total stock		$182,762,449
GOVERNMENTAL GRANTS:		
(754) Grants in aid of construction		$ 3,149,599
LONG TERM DEBT:		
(755) Funded debt unmatured	$422,350,000	
(755) Less respondent's holdings	138,851,000	$283,499,000
(755½) Long term debt in default		71,714,251
(756) Receivers' and Trustees' securities	$ 19,642,000	
(756) Less respondent's holdings	52,000	19,590,000
Total long-term debt		$374,803,251
CURRENT LIABILITIES:		
(759) Traffic and car service balances—Cr.		$ 7,827,417
(760) Audited accounts and wages payable		6,841,331
(761) Miscellaneous accounts payable		258,542
(762) Interest matured unpaid		101,657
(763) Dividends matured unpaid		70,128
(764) Unmatured interest accrued		2,054,229
(767) Accrued tax liability		5,288,385
(768) Other current liabilities		3,606,317
Total current liabilities		$ 26,048,006
DEFERRED LIABILITIES:		
(769½) Matured interest in default		$100,656,992
(770) Other deferred liabilities		3,062,641
Total deferred liabilities		$103,719,633
UNADJUSTED CREDITS:		
(772) Premium on funded debt		$ 396,783
(774) Maintenance reserves		653,668
(775) Accrued depreciation—Road		1,919,779
(775½) Accrued amortization of defense projects—Road		15,831
(776) Accrued depreciation—Equipment		84,892,223
(776½) Accrued amortization of defense projects—Equipment		747,483
(778) Other unadjusted credits		13,191,571
Total unadjusted credits		$101,817,346
CORPORATE SURPLUS:		
(779) Additions to property through income and surplus		$ 4,394,712
(784) Profit and loss	Dr.	57,231,197
Total corporate surplus	Dr.	$ 52,836,485
This system balance sheet excludes intercompany holdings of securities and accounts. The difference between the amounts at which such items are carried on the books of the Chicago and North Western and the Chicago, St. Paul, Minneapolis and Omaha Railway Companies is entered here to balance		4,283,418
Grand total		$742,747,217

Correct:

C. H. WESTBROOK
Comptroller, C. & N. W. Ry. Co.

APPENDIX B.

CHICAGO AND NORTH WESTERN SYSTEM

(C. & N. W. Ry. Co.—C. St. P. M. & O. Ry. Co.)

Income Account—Year ended December 31, 1942

I. OPERATING INCOME

Railway operating income:	
Operating revenues—	
Freight	$125,051,186
Passenger	23,075,248
Mail	3,142,566
Express	3,589,765
All other	7,266,378
Total operating revenues	$162,125,143
Operating expenses—	
Maintenance of way and structures	$ 21,191,394
Maintenance of equipment	27,578,562
Traffic	2,838,349
Transportation	54,795,174
Miscellaneous operations	1,481,954
General	4,114,429
Total operating expenses	$111,999,862
NET REVENUE FROM RAILWAY OPERATIONS	$ 50,125,281
Deductions from revenue:	
Railway tax accruals—	
Pay roll taxes	$ 4,363,197
Federal income taxes	9,337,322
All other taxes	4,957,002
Equipment rents—Net	2,490,347
Joint facility rents—Net	856,092
Total deductions	$ 22,003,960
NET RAILWAY OPERATING INCOME	$ 28,121,321

II. OTHER INCOME

Rental income	$ 926,894
Dividend income	518,700
Income from funded securities	137,184
Income from unfunded securities and accounts and other items	134,536
Total other income	$ 1,717,314
Total income	$ 29,838,635
III. MISCELLANEOUS DEDUCTIONS FROM INCOME	195,442
INCOME AVAILABLE FOR FIXED CHARGES	$ 29,643,193

IV. FIXED CHARGES

Rent for leased roads and equipment	$ 1,996
Interest on funded debt	16,442,890
Interest on unfunded debt	75,604
Total fixed charges	$ 16,520,490
NET INCOME	$ 13,122,703

Correct:

C. H. WESTBROOK,
Comptroller, C. & N. W. Ry. Co.

March 8, 1943

APPENDIX C.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

In Proceedings for the Reorganization of a Railroad.

In the Matter of
Chicago and North Western
Railway Company,
Debtor.
} No. 60448.

STATEMENT OF ASSETS AND LIABILITIES OF DEBTOR AS OF JANUARY 31, 1943 AND SUMMARY OF REVENUES AND EXPENSES OF DEBTOR FOR THE MONTH OF JANUARY, 1943.

TO THE CLERK OF SAID COURT:

Pursuant to Section 7 of Order No. 1, entered herein on June 28, 1935, I submit herewith a statement of the assets and liabilities of the Debtor as of January 31, 1943, together with a statement showing revenues and expenses of the Debtor for the month of January, 1943. Said statements are certified as correct by the chief accounting officer of the Debtor.

CHARLES M. THOMSON,
Trustee of the property of Chicago and North Western Railway Company.

Dated: March 10, 1943.
Filed: March 12, 1943.

ASSETS

INVESTMENTS:
(701) Road and equipment property.....
(702) Improvements on leased property.....
(702½B) Donations and grants.....
(704) Deposits in lieu of mortgaged property sold.....
(704½) Maintenance funds .....
(705) Miscellaneous physical property.....
(706) Investments in affiliated companies—
Stocks .....
Bonds .....
Advances .....
(707) Other investments—
Stocks .....
Bonds .....
Miscellaneous .....

CURRENT ASSETS:
(708) Cash .....
(709) Temporary cash investments.....
(711) Special deposits .....
(712) Loans and bills receivable.....
(714) Net balance receivable from agents and conductors..
(715) Miscellaneous accounts receivable.....
(716) Material and supplies.....
(717) Interest and dividends receivable.....
(719) Other current assets.....

DEFERRED ASSETS:
(720) Working fund advances.....
(722) Current account—assets—June 30, 1935, collected (see contra) .....
(722) Prior account—liabilities—June 30, 1935, paid (see contra) .....
(722) Other deferred assets .....

UNADJUSTED DEBITS:
(723) Rents and insurance premiums paid in advance....
(727) Other unadjusted debits.....

	Par value of holdings
(728) Securities issued or assumed by respondent—unpledged	$ 9,106,000.00
(729) Securities issued or assumed by respondent—pledged	83,542,000.00
	$92,648,000.00

ERN RAILWAY COMPANY
ason, Trustee
nuary 31, 1943

	Prior		Current		Total
	$544,598,212.32	Cr. $	12,530,003.39		$532,068,208.93
	376,868.91	Cr.	45,337.45		331,531.46
Cr.	2,510,330.64	Cr.	2,473,317.67	Cr.	4,983,648.31
	.....		145,600.29		145,600.29
	.....		550,000.00		550,000.00
	13,513,931.88		425,659.25		13,939,591.13
	27,244,538.67		60,000.00		27,304,538.67
	46,245,249.24		.....		46,245,249.24
	634,791.59		393,442.24		1,028,233.83
	3,910,575.93		220.00		3,910,795.93
	151,770.00		.....		151,770.00
	.....		12,479.76		12,479.76
	$634,165,607.90	Cr. $	13,461,256.97		$620,704,350.93
	.....	$	45,407,039.84	$	45,407,039.84
	.....		17,226,181.25		17,226,181.25
$	4,000.00		6,677,250.03		6,681,250.03
	.....		1,000.00		1,000.00
	.....		2,925,427.68		2,925,427.68
	1,657.72		6,885,323.67		6,886,981.39
	.....		9,488,851.87		9,488,851.87
	.....		89,482.41		89,482.41
Cr.	88.35		303,457.66		303,369.31
$	5,569.37	$	89,004,014.41	$	89,009,583.78
	.....	$	27,367.07	$	27,367.07
$	33,514,176.57		.....		.....
	.....	$	76,250,577.01		.....
	9,835,054.44		852,547.67		10,687,602.11
$	43,349,231.01	$	77,130,491.75	$	10,714,969.18
	.....	$	70,743.42	$	70,743.42
$	47,624.26		1,496,981.62		1,544,605.88
$	47,624.26	$	1,567,725.04	$	1,615,349.30
	$677,568,032.54		$154,240,974.23		$722,044,253.19

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
Charles M. Thomson, Trustee

Balance Sheet—January 31, 1943

LIABILITIES		Prior	Current	Total
STOCK:				
(751) Capital stock		$180,835,300.00	.....	$180,835,300.00
Scrip		4,545.25	.....	4,545.25
(753) Premiums and assessments on capital stock		29,657.75	.....	29,657.75
		$180,869,503.00	.....	$180,869,503.00
LONG TERM DEBT:				
(755) Funded debt unmatured	$373,391,000.00			
Less respondent's holdings	92,596,000.00	$280,795,000.00	.....	$280,795,000.00
(755½) Long term debt in default		$ 71,714,251.67	.....	$ 71,714,251.67
Equipment obligations	$ 20,682,347.58			
(756½) Less respondent's holdings	52,000.00	$ 1,598,000.00	$ 19,032,347.58	$ 20,630,347.58
CURRENT LIABILITIES:				
(759) Traffic and car service balances		Dr. $ 230.79	$ 5,942,616.03	$ 5,942,385.24
(760) Audited accounts and wages payable		3,376.81	6,257,718.98	6,261,095.79
(761) Miscellaneous accounts payable		32.68	183,708.91	183,741.59
(762) Interest matured unpaid		15,673.75	21,582.60	37,256.35
(763) Dividends matured unpaid		62,055.70	.....	62,055.70
(764) Unmatured interest accrued		.....	117,049.39	117,049.39
(767) Accrued tax liability		14,898.41	5,642,603.75	5,657,502.16
(768) Other current liabilities		5,000.00	3,003,055.33	3,008,055.33
		$ 100,806.56	$ 21,168,335.04	$ 21,269,141.60
DEFERRED LIABILITIES:				
(769½) Interest in default		$103,892,078.95	$	$103,892,078.95
(770) Current account—liabilities—June 30, 1935, paid (see contra)		76,250,577.01	.....	.....
(770) Prior account—assets—June 30, 1935, collected (see contra)		.....	$ 33,514,176.57	.....
(770) Other deferred liabilities		66,471.75	79,624.96	146,096.71
		$180,209,127.71	$ 33,593,801.53	$104,038,175.66
UNADJUSTED CREDITS:				
(772) Premium on funded debt		$ 375,501.66	$ 20,218.34	$ 395,720.00
(773½) Equalization reserves		.....	303,846.05	303,846.05
(774) Maintenance reserves		.....	547,450.00	547,450.00
(775½) Accrued amortization of defense projects—Road		.....	17,735.75	17,735.75
(776) Accrued depreciation—Road and equipment		62,843,454.35	14,588,438.80	77,431,893.15
(776½) Accrued amortization of defense projects—Equipment		.....	616,651.30	616,651.30
(778) Other unadjusted credits		20,503.19	13,523,365.99	13,543,869.18
		$ 63,239,459.20	$ 29,617,706.23	$ 92,857,165.43
SURPLUS:				
(784) Unearned surplus		.....	$ 165.40	$ 165.40
(785) Appropriated surplus		$ 1,175,287.11	.....	1,175,287.11
(786) Earned surplus		Dr. 102,133,402.71	50,828,618.45	Dr. 51,304,784.26
		Dr. $100,958,115.60	$ 50,828,783.85	Dr. $ 50,129,331.75
		$677,568,032.54	$154,240,974.23	$722,044,253.19

Correct:

(Signed) C. H. WESTBROOK,
Comptroller.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
Charles M. Thomson, Trustee

Income Account—Month of January, 1943

		Prior	Current	Total
I. OPERATING INCOME				
Railway operating income:				
Operating revenues—				
Freight	Dr.	$ 3,379.01	$ 8,264,856.54	$ 8,261,477.53
Passenger	Dr.	2.98	2,034,139.41	2,034,136.43
Mail		.....	219,887.44	219,887.44
Express		.....	313,078.19	313,078.19
Miscellaneous		.....	384,337.96	384,337.96
Incidental	Dr.	160.00	260,397.97	260,237.97
Joint facility—Net		.....	4,720.96	4,720.96
Total operating revenues	Dr.	$ 3,541.99	$11,481,418.47	$11,477,876.48
Operating expenses—				
Maintenance of way and structures		$ 33.37	$ 1,568,566.90	$ 1,568,600.27
Maintenance of equipment		26.66	2,016,015.86	2,016,042.52
Traffic		.....	194,945.36	194,945.36
Transportation		140.37	4,029,023.25	4,029,163.62
Miscellaneous		.....	134,545.43	134,545.43
General		.....	296,314.51	296,314.51
Total operating expenses		$ 200.40	$ 8,239,411.31	$ 8,239,611.71
NET REVENUE FROM RAILWAY OPERATIONS	Def.	$ 3,742.39	$ 3,242,007.16	$ 3,238,264.77
Railway tax accruals		.....	1,403,910.43	1,403,910.43
RAILWAY OPERATING INCOME	Def.	$ 3,742.39	$ 1,838,096.73	$ 1,834,354.34
Rent income:				
Rent from locomotives		.....	$ 42,592.43	$ 42,592.43
Rent from passenger-train cars		.....	59,153.50	59,153.50
Rent from work equipment		.....	1,190.34	1,190.34
Joint facility rent income		.....	36,075.16	36,075.16
Total rent income		.....	$ 139,011.43	$ 139,011.43

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS } ss.
EASTERN DIVISION

C. H. Westbrook, first upon oath being duly sworn, says that he is the chief accounting officer, to-wit, Comptroller of Chicago and North Western Railway Company, Debtor herein; that the attached and foregoing statement of assets and liabilities of the Debtor as of January 31, 1943, and the statement showing revenues and expenses of the Debtor for the month of January, 1943, are true and correct as shown by the books and accounts of said Debtor.

C. H. WESTBROOK.

Subscribed and sworn to before me this 10th day of March, 1943.

P. J. SESTERHENN,
Notary Public.
My Commission Expires May 6, 1946.

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS } ss.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Statement of Assets and Liabilities of Debtor as of January 31, 1943, and Summary of Revenues and Expenses of Debtor for the Month of January, 1943, filed March 12, 1943, In the Matter of

Chicago and North Western
Railway Company,
Debtor—No. 60448,

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 22nd day of March, A. D. 1943.

ROY H. JOHNSON,
Clerk.

(Seal)

By MARGUERITE GILMOUR,
Deputy Clerk.

APPENDIX D.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Charles M. Thomson, Trustee

March 18, 1943

Cash	$48,046,944
Temporary cash investments	21,226,181
Special deposits*	6,619,404
	$75,892,529

* Includes, as of March 18, 1943, $5,228,378 balance in possession and control of Equipment Trustees from proceeds of sale of equipment trust notes, and $1,391,026 representing funds set aside for specific obligations.

I, Charles H. Westbrook, Comptroller of Chicago and North Western Railway Company, do hereby certify that the figures contained in the foregoing statement are true and correct as shown by the books and records of said trust estate, but are gross figures which do not allow for or take into consideration current liabilities, taxes accrued or other claims upon or against said cash, temporary cash investments and special deposits.

Dated at Chicago, Illinois, this 19th day of March, 1943.

C. H. WESTBROOK,
Comptroller.

FILED
MAR 31 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 34, 35, 36

IN THE MATTER OF THE
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR,
Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,
Respondents.

BRIEF OF LIFE INSURANCE GROUP COMMITTEE AND MUTUAL SAVINGS BANK GROUP COMMITTEE, IN OPPOSITION TO THE DEBTOR'S SECOND MOTION FURTHER TO SUPPLEMENT THE RECORD.

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
GEORGE RAGLAND, JR.,
Attorneys for Life Insurance Group,
FRED N. OLIVER,
WILLARD P. SCOTT,
Attorneys for Mutual Savings Group.
SIDLEY, MCPHERSON, AUSTIN & BURGESS,
OLIVER & DONNALLY,
Of Counsel.

March 29, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 34, 35, 36

IN THE MATTER OF THE
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,

Respondents.

BRIEF OF LIFE INSURANCE GROUP COMMITTEE AND MUTUAL SAVINGS BANK GROUP COMMITTEE, IN OPPOSITION TO THE DEBTOR'S SECOND MOTION FURTHER TO SUPPLEMENT THE RECORD.

Certain figures relating to war earnings are set forth in the debtor's "Second Motion Further to Supplement the

Record'' and supporting brief which the debtor has filed on behalf of the stock interests. Such figures are grossly misleading even in respect to the income from wartime traffic for the reasons stated in our brief of December 29, 1942, to which we respectfully refer the Court, in reply to the debtor's initial motion to supplement the record.

We described there also, the comprehensive studies which the Commission considered in making its finding as to the road's true, long-term earning capacity. (pp. 16-19) That finding by the Commission is made the cornerstone of a plan that will serve as a basis for the company's financial structure for the indefinite future.

The Court's statements respecting war earnings in the *Milwaukee* and *Western Pacific* opinions apply with equal force here. The record shows the earnings experience of this property during the last war. In 1914 and 1915 the gross revenues of the debtor averaged approximately $82,500,000 and the net railway operating income remained fairly constant at slightly more than $19,000,000. (Com. Ex. 523, pp. 214, 226)[1] In 1916 the gross revenues increased some $17,000,000 over those in the previous year, and the net shot up by approximately $8,250,000. In 1917, however, wage increases resulting from the Adamson Act of 1916, coupled with a rise in material prices, began seriously to cut into profits even though gross revenues continued to rise. (R. 4792) The debtor's gross revenues for 1917 mounted some $11,000,000 higher than in 1916, but the net railway operating income declined by almost $4,000,000. (Com. Ex. 523, pp. 215, 226) The net railway operating income of this railroad before, during, and im-

[1] The effect of the European War which began in August, 1914, upon traffic of American railroads was not measurably felt until 1916, when American exports rose from $2,716,000,000 in the preceding year to $4,272,000,000. (I. L. Sharfman, The American Railroad Problem, pp. 66-67)

mediately following the temporary bulge of earnings in that conflict is shown in the following table, which is taken from Com. Ex. 523, pp. 215-6:

Year	Net Railway Operating Income
1915	$19,393,742
1916	27,714,458
1917	23,762,324
1918	12,441,437
1919	*12,678,750* (*Deficit*)
1920	1,609,231
1921	6,651,136

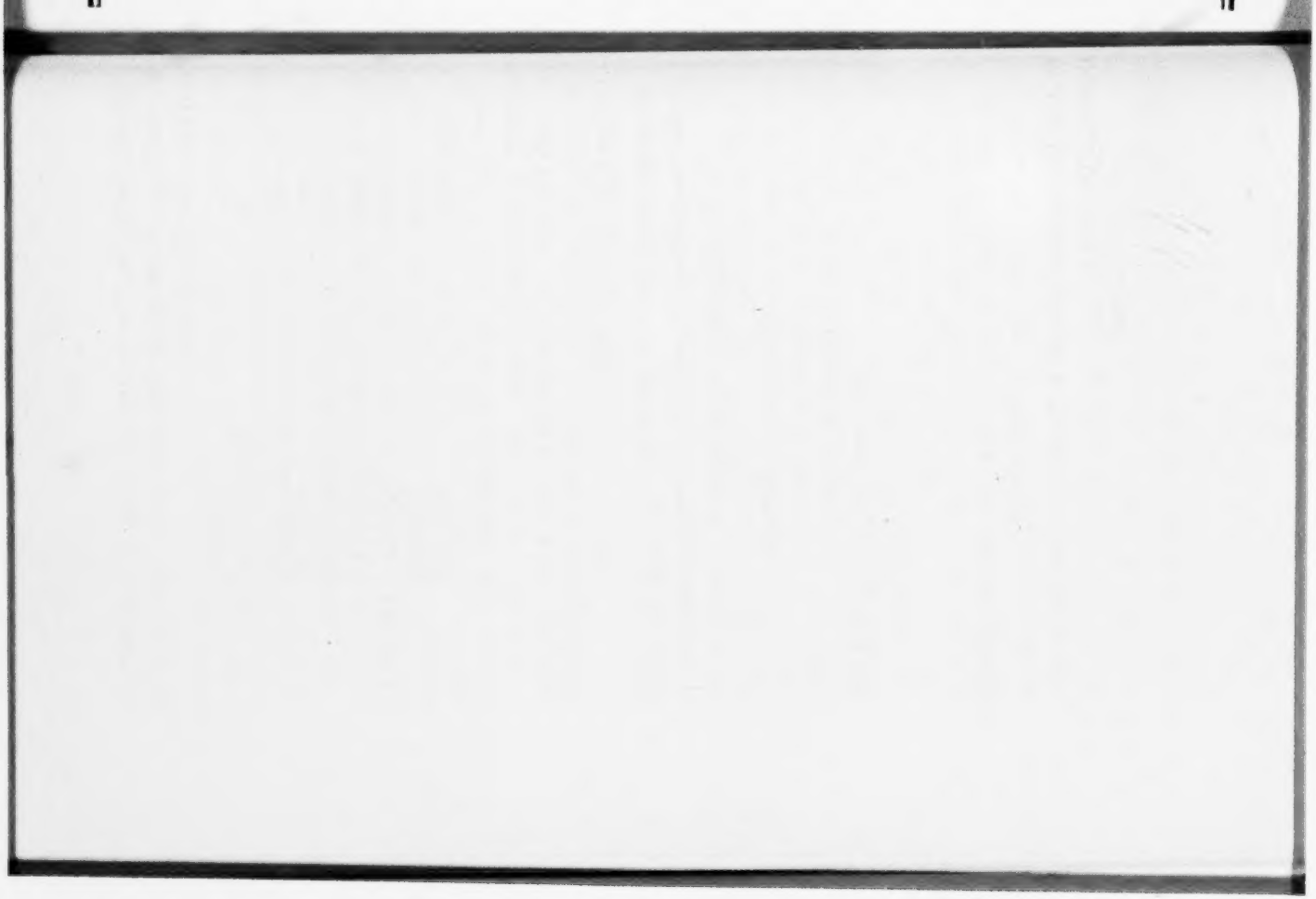
These figures show again the temporary and illusory character of wartime earnings. They lasted only a short time, and the road was then left in a much worse condition than before, the upsurge in earnings being translated into a tremendous operating deficit as early as 1919.

We respectfully ask that the debtor's motion be denied and that the petitions for certiorari likewise be denied.

Respectfully submitted,

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
GEORGE RAGLAND, JR.,
Attorneys for Group of Institutional Investors.
FRED N. OLIVER,
WILLARD P. SCOTT,
Attorneys for Mutual Savings Bank Group.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
OLIVER & DONNALLY,
Of Counsel.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

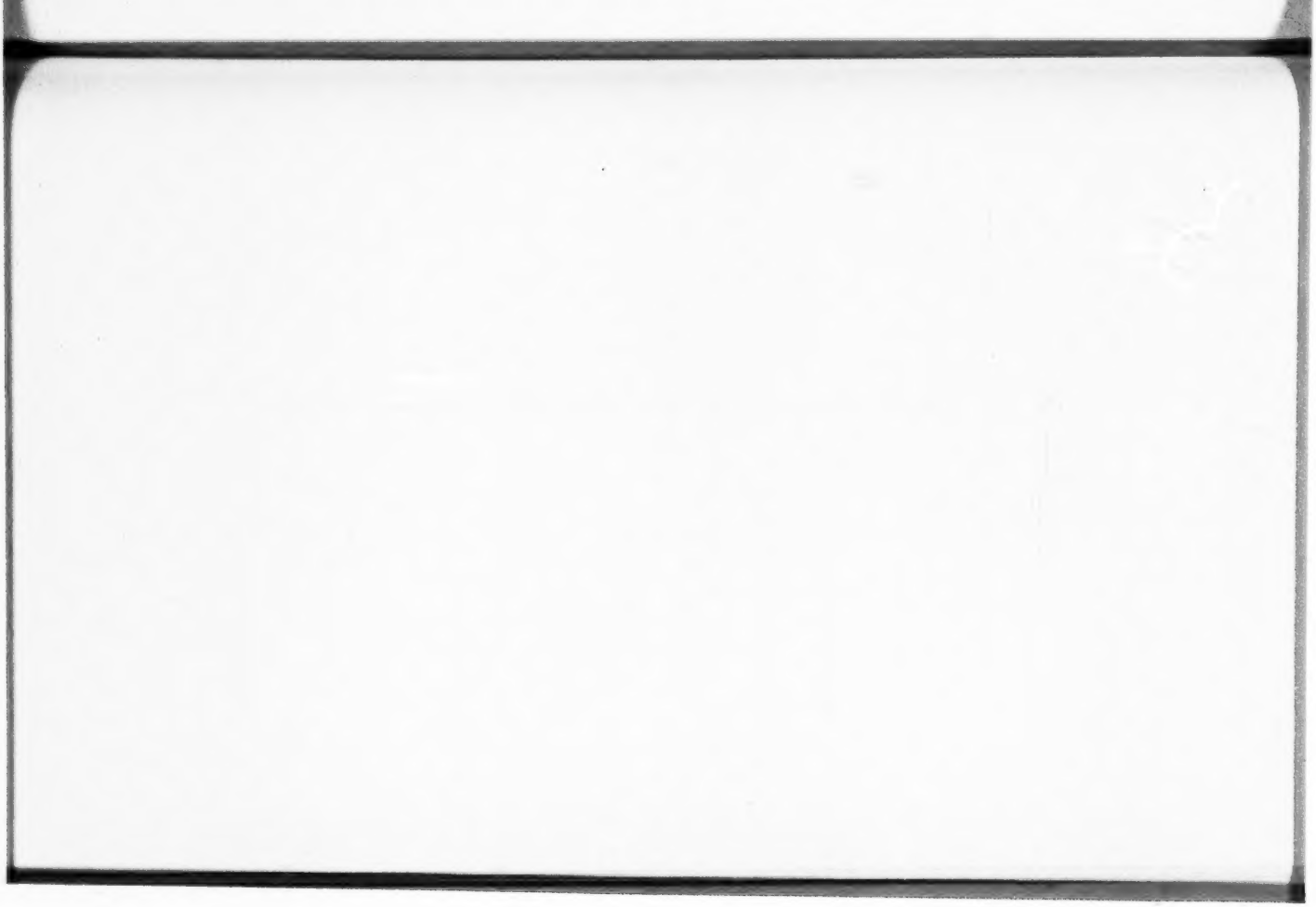
Respondents.

MOTION FOR PERMISSION TO FILE ATTACHED SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor, Petitioner.

April 1, 1943.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562



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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

MOTION FOR PERMISSION TO FILE ATTACHED SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Counsel for petitioner respectfully move for permission to file the supplemental brief attached hereto in support of

petition for writs of certiorari, and in support thereof show as follows:

On March 15, 1943, this Court handed down its decisions in Docket Nos. 11-19, 32, *Group of Institutional Investors et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company et al.,* and Docket Nos. 7, 8, 20, 33, and 61, *Ecker et al.* v. *Western Pacific Railroad Corporation et al.,* in which important principles of law and procedure affecting reorganization of railroad companies under Section 77 of the Bankruptcy Act are enunciated. Counsel for petitioner herein desire to submit certain observations as to the effect which such decisions may have upon the disposition of the petition for writs of certiorari herein.

These proceedings relate to a plan of reorganization of the Debtor, Chicago and North Western Railway Company, under Section 77 of the Bankruptcy Act. A number of questions involved in these proceedings are related to, or are similar to, questions considered and disposed of in the two decisions above named, but many important questions involved in these proceedings did not exist in those cases and should be considered and specifically passed upon by this Court.

The two decisions above referred to do not dispose of the objections raised by the Debtor to the plan of reorganization which was approved by the District Court on October 12, 1940 (Tr. 5072), nor do these decisions dispose of the objections to the decree of the District Court of June 27, 1941, confirming the plan of reorganization of the Debtor. (Tr. 5591)

The questions involved in the two appeals from the orders of October 12, 1940, approving the plan of reorganization and of June 27, 1941, confirming the plan of reorganization are important and their determination should

be helpful in other proceedings for reorganization of railroads.

WHEREFORE, request is respectfully made that the supplemental brief attached hereto be received and considered in connection with said petition for writs of certiorari.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor,
Petitioner.

Dated at Chicago, Illinois,
April 1, 1943.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Foreword.

The decisions of this Court on March 15, 1943, in Docket Nos. 11-19, 32, *Group of Institutional Investors et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. et al.*, and in Docket Nos. 7, 8, 20, 33 and 61, *Ecker et al.* v. *Western Pacific Railroad Corp. et al.*, had relationship primarily to the facts of record in each case, and where, as here, there is a different set of facts, the principles announced in those cases may not have complete application. In this brief we are undertaking to emphasize the points involved in the instant application for writs of certiorari which are not controlled by the opinions of this Court in said two cases.

Petitioner seeks a reversal of the decision of the Circuit Court of Appeals for the Seventh Circuit affirming the decree of the District Court of October 12, 1940, approving the plan of reorganization of the Debtor, and of the decree of June 27, 1941, confirming such plan of reorganization.

There is a fundamental fact which must be kept constantly in mind in determining the various legal and administrative questions in every plan of reorganization of a railroad company. All the operating revenues of the railroad company are determined by the same administrative body, the Interstate Commerce Commission, that prepares the plan of reorganization; such plan must in a very large measure depend upon the revenues which the Commission permits the railroad company to receive. In other words, the Interstate Commerce Commission is responsible pri-

marily for the corporate structure, for the revenues, and in a large measure for the expenditures of the company. Thus, the Commission, in the long run, is responsible for the financial plight of any of the interstate railroads of this country.

Debtor's petition under Section 77 was filed because of its inability to pay interest on its outstanding debt securities, and it sought to effect a plan of reorganization. Had the interest on its debt been contingent upon earnings, no such proceeding would have been necessary. There has been no finding, either of a court or the Commission, that the Debtor is insolvent. The rights of investors in securities of a public utility, subject as these public utilities are to Governmental regulation, should not be disposed of on the primary basis of earnings thus controlled. If the Government may of right determine through rate-making and other regulation how much a utility will be allowed to earn, then it should not force the earnings which it permits, to be the controlling basis for capitalization to be issued to investors. We think that Congress intended by Section 77 to reorganize railroad corporations unable to meet their debts as they mature, by a minimum change in capital structure which would enable the corporation to continue as a public utility. By change in rate and character of interest, whether fixed or contingent, a new plan of reorganization can always be effected without changing priority of debt or in any way violating the recognized principles such as set forth in *Northern P. R. Co.* v. *Boyd*, 228 U. S. 482, and in the case of *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510.

Debtor's Objections to Plan of Reorganization.

Debtor's objections to the plan of reorganization were eighteen in number and are set forth at pages 42 to 44, inclusive, of the Petition and Brief in Support of Petition for Writs of Certiorari herein, and more fully in the transcript at pages 4000-15. These objections have not been passed upon by this Court and we think it important to call them to the Court's attention so that they may be, since they raise points appearing in many railroad reorganizations.

Objection No. 1. Maximum Capitalization.

The plan of reorganization fixed the maximum limits of capitalization at $449,974,309, but the Commission authorized as against the assets as of January 1, 1939, the issue of only $423,774,309; first and general mortgage bonds, Series B, in the sum of $13,100,000 (Tr. 3634), and common stock in a like amount (Tr. 3653), were reserved to finance subsequent expenditure in the rehabilitation and improvement program, and when issued would represent additional capitalizable assets. The District Court affirmed the finding of the Commission as to maximum capitalization. (Tr. 5031)

Moreover, there have been large expenditures during trusteeship since the record before the Commission was closed; how great these expenditures may be is not disclosed by the record. We do know that current assets, principally cash, of the Debtor have increased from $28,533,540 (Tr. 1469) on February 29, 1940, to $89,009,584 on January 31, 1943 (pages 15-16 of Second Motion Further to Supplement Record), an increase of $60,476,044 in assets, a sum much more than adequate to warrant issue of additional securities required to take care of the

$40,790,912, including interest to December 31, 1938, of convertible debentures which did not participate in the Commission's plan. (Tr. 3677)

Then, too, it must not be forgotten that during trusteeship, subsequent to February 29, 1940, and prior to February 1, 1943, there has been redemption of debt in the aggregate amount of $9,248,948 and payments of interest totaling $19,351,456, an aggregate principal of debt and interest payments of $28,600,404. See statement of assets at February 29, 1940 (Tr. 1469), and same at January 31, 1943 (pages 15-16 of Second Motion Further to Supplement Record). Certainly, these changes in financial position and assets warrant remanding of the proceedings to determine whether, in the opinion of the Commission, modification should be made in the certified plan of reorganization.

We are not unmindful of the rule in the *Milwaukee* and *Western Pacific* cases which gives to the Commission vast discretionary powers in determining the capitalization of a reorganized company but we believe that in the instant case the action of the Commission was without adequate support in the evidence and violates recognized principles which the Commission has followed in a number of other cases.

Under date of March 9, 1938, a member of Division 4 of the Interstate Commerce Commission transmitted to all parties to the proceeding a memorandum of its Bureau of Finance concerning total capitalization, fixed charges, contingent charges, and equity of common and preferred stockholders in connection with the plan for reorganization of the Chicago and North Western Railway Company, Debtor. That memorandum formed the basis for the report of the Commission on its final plan of reorganization in these proceedings. In two important re-

spects the report of the Commission departs from the memorandum which was filed in the District Court as Debtor's Exhibit 21. In considering this memorandum it is important to note that it represents the views of the Bureau of Finance which had been in control of the proceeding and, in a sense, performed the functions of a master.

The Commission omits from its report the following paragraph found at the bottom of page 14 of Exhibit 21:

> "The assets of the debtor as carried on the debtor's books of account which are capitalizable as of December 31, 1936, within the limitations announced in *Securities of Louisville & Nashville R. R.*, 76 I. C. C. 718, are approximately $597,449,127, composed of $548,543,132 investment in road and equipment, $379,209 improvements on leased railway property, $2,779,070 miscellaneous physical property, $26,983,539 investments in stocks of affiliated carriers, $18,664,207 working capital and material and supplies, and $99,970 special deposits for mortgaged property sold."

In *Securities of Louisville & Nashville R. R.*, 76 I. C. C. 718, 720, to which reference is made in the memorandum of the Bureau of Finance, the Commission stated that it is "'convinced that a substantial surplus should remain uncapitalized as a support for the applicant's credit, providing for emergency needs, off-setting obsolescence and necessary investments in non-revenue-producing property, and serving as a general financial balance-wheel.'" The quotation is from the statement of the Commission in *Stock of Delaware, Lackawanna & Western R. R.*, 67 I. C. C. 426, 433, cited with approval by the Commission in the *Securities of Louisville & Nashville* case, supra, and to which citation the Commission added the further expression of opinion (page 720):

> "Nor is it true that the nature of the assets which a carrier seeks to capitalize is immaterial. We should

> authorize the capitalization of those assets of the carrier only which have been provided and which are intended for continuing productive use in the service of transportation. Such assets will be hereinafter referred to as 'capitalizable assets.' "

The Commission allowed the issuance of new stock in that case to the amount of $45,000,000, leaving uncapitalized the sum of $29,442,773 capitalizable assets of the Louisville & Nashville.

The Commission's maximum permissible capitalization herein of $423,774,309, exclusive of $13,100,000 of bonds to be sold for cash and $13,100,000 of stock to be allotted to the purchaser of such bonds, for improvement purposes, falls short of the capitalizable assets of the Debtor as of December 31, 1936, as found by the Bureau of Finance, in its memorandum above referred to (Exhibit 21), in the sum of $173,674,818, exclusive of non-carrier property. That memorandum stated the views of the Bureau of Finance as to maximum capitalization as follows (page 30, Ex. 21):

> "Consideration of the existing capitalization, investment, probable capitalizable assets, valuation data, the earnings of the carrier, along with the other facts developed in the hearings, and the capitalizations proposed in plans heretofore presented, leads to the view that the total capitalization which the Commission should find permissible in the reorganization is approximately $468,000,000."

Thus we think we have established that the Commission's maximum limitation of capitalization, as carried into effect under its plan of reorganization, takes capitalizable assets of the present stockholders of the Debtor, Chicago and North Western Railway Company, and transfers them to the new or reorganized company, without any consideration whatever to the stockholders of the

Debtor, thus depriving them of their property in violation of statutory and constitutional rights. The issuance of stock subordinate in kind to that provided for in the authorized capitalization evidencing ownership of such capitalizable assets as found by the Bureau of Finance, would have in no wise deprived the holders of obligations of the Debtor, having priority over the present preferred and common stockholders, of any right to which they are morally, equitably or legally entitled. The total capitalization provided for at the time of reorganization is grossly less than capital assets and in that respect the plan fails to meet the requirements of the law of the land.

In our brief in support of the petition for writs of certiorari, page 45, and appendix, pages 49 and 50, we set forth a comparison of certain data of the Milwaukee and of the North Western. Briefly, it there appears that as of December 31, 1938, the total capitalization of the Milwaukee exceeded its rate-making value by $16,000,000, while the North Western capitalization was $220,000,000 less than its rate-making value. Under the plans of reorganization as of January 1, 1939, the debts of the reorganized companies are practically the same, yet the fixed charges of the Milwaukee are approximately $900,000 greater than the fixed charges of the North Western. The authorized preferred stock of the reorganized companies is practically the same but the authorized common stock of the Milwaukee is approximately $95,000,000 greater than the common stock of the North Western. The authorized debt of the Milwaukee is 40.8 per cent of the total capitalization, while in the case of the North Western the debt is 49.4 per cent of the capitalization. Had the plan of reorganization of the North Western provided that the debt of $222,000,000 bear the same ratio to total capitalization as in the case of the Milwaukee, the total capital stock of the reorganized debtor would have

been $322,000,000, an increase of $96,000,000 over that authorized in the plan of reorganization.

In the case of the Milwaukee, the estimated future "normal earnings" were $15,894,000, which should be compared with the estimated "normal earnings" in the case of the North Western of $14,625,000. While the normal future year earnings were only $1,269,000 greater than in the case of the North Western, the Commission authorized a total capitalization approximately $100,000,000 greater for the Milwaukee than for the North Western.

No dividends had been paid on the stock of the Milwaukee since 1917, but in the case of the North Western, as found by the Commission in *Chicago & North Western Railway Company Reconstruction Loan,* 202 I. C. C. 347, 349, there had been an unbroken record of dividends on its common stock by the North Western prior to the closing months of 1931 over a period of 54 years. No breath of scandal has ever touched the financial structure of the petitioner.

Debtor's contention is that the Commission should fix a capitalization of the new company that gives recognition to the present existing capital including the reasonable investment represented by the physical properties of the company, both common carrier and non-common carrier, and that earnings should be determinative of the kind of security and the character of interest on debt of the new company, whether fixed or contingent.

The action of the Commission in approving the plan of reorganization herein with a maximum capitalization of $423,774,309 is at variance with the action of the Commission approximately eight months earlier than the date of bankruptcy herein, for on October 17, 1934, the Commission in the case of *Chicago & North Western Railway Company Reconstruction Loan,* 202 I. C. C. 347, found the

Chicago and North Western Railway not to be in need of financial reorganization in the public interest at that time, and approved a loan of not to exceed $4,138,000 for the payment of unpaid vouchers, of taxes and interest. In passing on the loan, the Commission said (page 349):

> "Prior to the closing months of 1931 the applicant had an unbroken record of dividends on its common stock over a period of 54 years. *It is reasonably capitalized, as evidenced by an investment of approximately $643,518,851 and capital liabilities in the amount of $527,688,900. Its corporate surplus on December 31, 1933, was $39,387,231.* From 1922 to 1930, inclusive, it earned its fixed charges each year by not less than one and a half times. The evidence is that its financial difficulties began with and are incident to the general depression and have been aggravated by the drouth and the severity of hard times in the vast agricultural territory which it serves. It is possible that its resources may not prove to be sufficient to carry it on and into better times. But its record in the past and the nature of its difficulties are such as to lead us to believe that the applicant's present need is not reorganization of capital structure so much as it is an opportunity with reasonable aid to work out its problems." (Our italics.)

In a decision dated September 29, 1934, less than three weeks earlier than the case just cited, the Commission said, in its findings in *Chicago & North Western Railway Company Reconstruction Loan*, 202 I. C. C. 271, at page 274:

> "The applicant's funded debt outstanding on July 31, 1934, was $347,184,100, including $15,447,200 of reconstruction loans, and capital stock outstanding was $180,869,503. If to the rate-making value as of June 30, 1917, of the property owned by the applicant on December 31, 1930, there be added the net cost of property changes between then and date of valuation, the sum is $642,736,392, adjusted for working capital as of December 31, 1931. This is exclusive of investments of $80,692,410 in other companies

> and miscellaneous physical property, as of July 31, 1934. In view of the conservative relation of the applicant's debt to probable property valuation, and its high earnings previous to the present depression, we are of the opinion that a financial reorganization of the applicant is not required in the public interest at this time."

There is no finding of the Commission in its plan of reorganization from which it can be determined that what was a "conservative relation of the applicant's debt to probable property valuation," as of September 29, 1934, has now changed so that only $423,774,309 is the value of capitalizable assets.

As of January 1, 1938, the Commission finds Debtor's total principal amount of debt securities to be $370,361,965 (Tr. 3520), and adding to this the preferred stock of $22,395,000 and the common stock of $158,440,300, gives a grand total of $551,197,265 as the capitalization as of that date. The rate-making value as of December 31, 1935, is $676,793,588 (Tr. 3509) as compared with $642,-736,392 on December 31, 1931 (see 202 I. C. C. 271, 274), an increase in the amount of $34,057,196. Debt increased from $347,184,100 on July 31, 1934 to $370,361,965 on December 31, 1938, an increase of $23,177,865. The increase in rate-making value of $34,057,196 in the same period is $10,879,331 greater than the increase in debt. Certainly, if the relation of debt to property valuation was conservative on July 31, 1934 (the Commission so found on September 29, 1934), and the property valuation has increased by $10,879,331 more than the increase in debt during the period ending December 31, 1938, the relation of debt to property valuation is still conservative.

In view of the Commission's finding in October, 1934, that the North Western was then reasonably capitalized,

and its finding in September, 1934, that debt was reasonably related to valuation of property, it is clear that the Commission is arbitrary in finding that capitalization should not exceed $423,774,309 at date of reorganization.

In a very able article entitled "Federal Regulation of Railway Management and Finance," by Kenneth F. Burgess, Esq., (counsel herein for the insurance companies), 37 Harvard Law Review, 705, at page 717, the author discusses the principles of capitalization as applied by the Commission in regulation of security issues. At the time the article was written, the Transportation Act, 1920, 41 Stat. at L. 456, had been in effect a few years and the author discussed capitalization, saying at page 728-9:

> "* * * The requirement that 'necessary investments in nonrevenue-producing property' be uncapitalized, and that capitalization should only be permitted in respect to assets 'intended for continuing *productive use* in the service of transportation,' may well be rejected by the courts, for a railroad corporation should be permitted to earn a return upon all property 'necessary' to its public service, *and to capitalize it without regard to its revenue-producing qualities.*" (Our italics.)

At the end of the above quotation is a footnote, which reads as follows:

> "Section 19a of the Interstate Commerce Act requires the Commission to ascertain the value of 'all the property owned or used by every common carrier' subject to the Act. See 37 Stat. at L. 701. There seems to be nothing in the Act requiring a distinction between productive and unproductive railway property, and no test is given as a basis for any differentiation. The Commission itself has steadily recognized the propriety of assigning unproductive investments in railroad property to 'Investment in Road and Equipment'. For example, primary account No. 39 under 'Road', in the Commission's classification of July 1, 1914, is entitled "Assess-

ments for Public Improvements'. These are grading, sewering, paving, etc., and are assigned to Investment in Road, while the carriers' proportion of the cost of maintaining these public improvements must be included in operating expenses. Similarly the original cost of track elevation to conform to state or municipal requirements, viaducts, fences, crossing gates and signs, cattle-guards, and passenger depot facilities, regardless of their productive character, are required to be assigned to the investment account. Section I, par. 21, authorizes the Commission to require a carrier to provide '*safe* and adequate facilities' for performing car service; and Section 26 authorizes it to require the installation of automatic train control devices and other safety devices. The 'Ash Pan Act', the 'Boiler Inspection Act', and the 'Safety Appliance Acts' also impose certain capital expenditures, which might be classed as 'unproductive', upon the carriers in the public interest. To provide for these various improvements in the future would seem to be a 'lawful object' for which securities might be issued under Section 20a. A rule by which future investments in such improvements could be capitalized, but investments already made can not, is not entirely logical."

We think this Court may well endorse the view of Mr. Burgess at that time, when he expressed his own views as a student of the law, that a railroad corporation should be permitted to capitalize all property necessary to its public service "without regard to its revenue-producing qualities."

The Commission's maximum permissive capitalization exceeds by $26,200,000 the capitalization to be outstanding as of the date of reorganization. All of the creditors have been taken care of in the order of their priority, except the holders of convertible bonds, for which $45,860,390 of common stock is authorized, stated at $100 per share. The principal claim of the convertible bondholders as stated in the Commission report (Tr. 3677), is $72,-

335,000 as of December 31, 1938, with unpaid interest claimed of $14,316,302 as of said date, a total claim of $86,651,302. The common stock allotted to the convertibles in the sum of $45,860,390 falls short of the principal amount of convertible debenture claim by $26,474,610 and of the total of principal and unpaid interest by $40,790,912.

Applying $26,200,000 of the capitalization reserved for rehabilitation and improvement, to the convertible debenture principal amount unrecognized in the reorganization of $26,474,610, leaves $274,610 for which no allocation is possible to be made under the permissible capitalization, or if applied against the principal and interest in the amount of $40,790,912, leaves $14,590,912 for which no allocation is permissible under the Commission's finding.

The Commission's plan of reorganization is proposed to be effective as of January 1, 1939, and in its computation of interest for which securities are to be issued as of that date, the accumulated interest as of that date is $60,008,639. (Tr. 3677) If the plan of reorganization be made effective as of the date of the "bankruptcy," June 28, 1935, only $4,855,637 of unpaid interest shown on page 3671 of the record would have accrued, and therefore the reorganized company would require only $384,-963,420 of capitalization to liquidate all of the claims of the creditors, both principal and interest, leaving $65,010,-889, the remainder of permissive capitalization under the plan of reorganization, available for the preferred and common stockholders as of that date. (See Debtor's District Court Ex. 33.)

Objection No. 2. Value of equity of Debtor's preferred and common stock.

Objection No. 2 challenges the finding of the Commission that there is no value in the equity of the preferred and common stock. The opinion of the District Court

overrules this objection (Tr. 5031), and the Circuit Court of Appeals affirmed that finding. (Tr. 5805)

Changed conditions, errors in maximum capitalization, error in the treatment of the claim of the Reconstruction Finance Corporation, and error in determining the effective date of the plan undoubtedly require the return of the proceedings to the Commission for further consideration at which time the Commission should determine anew the question of whether equity of the stock has value. In other words, if the plan of reorganization is sent back to the Commission because of its failure properly to fix the maximum capitalization, or to require payment of the claim of the Reconstruction Finance Corporation in cash, thus releasing some $135,000,000 of securities for other creditors and stockholders or to make the plan effective as of June 28, 1935, there will be ample securities within the maximum limits of capitalization to provide for all the creditors in order of priority and leave a substantial equity to the preferred and common stockholders.

Objections Nos. 6, 7, and 8 challenge the plan of reorganization in so far as it deals with the claim of the Reconstruction Finance Corporation. (Tr. 4002-8)

Objection No. 6. The treatment accorded to the Reconstruction Finance Corporation is unfair and inequitable.

(a) The amount of securities allotted to Reconstruction Finance Corporation is excessive.

The principal of the claim of the Reconstruction Finance Corporation as of June 28, 1935, is $42,250,133. (Tr. 3627) Computed at 4 per cent, as at December 31, 1938, the unpaid interest amounted to $4,781,867. If computed at the rate of 5 per cent and 6 per cent as stated in the notes, as of said date the unpaid interest would

amount to $6,934,772, the difference in interest charges being $2,152,905. To secure the payment of those notes, securities of the Chicago and North Western and of the Omaha were pledged in an aggregate sum of $95,099,000, as of December 31, 1937 (Tr. 3525), as were other securities in the form of stocks and bonds, in the sum of $6,714,800 (Tr. 3525), a total of all collateral of $101,813,800.

In the following tables we set forth the items of securities to be received by the Reconstruction Finance Corporation under the plan of reorganization as of January 1, 1939, in settlement of its claim for principal amount of notes, of $42,250,133 and accrued interest of $6,934,772, in accordance with the rates of 5 per cent and 6 per cent as stated in the notes:

Securities of reorganization company allocated with full ownership in R. F. C. (Tr. 3677):		
Fifteen-year secured notes	$25,000,000	
First and general mortgage bonds, Series A	7,783,180	
Second mortgage convertible income bonds, Series A, 4½ per cent	12,114,530	
Preferred stock, Series A, 5 per cent	15,543,462	
Common stock, no par (stated at $100 a share)	23,259,836	
Total		$83,701,008
Securities given unconditionally to R. F. C. (Tr. 3701):		
Union Pacific Railway Company preferred stock, par value	$ 2,085,000	
New York Central Railroad Company 4 per cent bonds, 1998	64,000	
New York Central & Hudson River Railroad Company 4½ per cent bonds, 2013	100,000	
Total		2,249,000
Securities given as collateral to secure $25,000,000 of 15-year notes (Tr. 3701):		
Chicago and North Western Railway Company equipment trust 4½ per cent, Series Y certificates	$ 104,000	
Chicago, St. Paul, Minneapolis & Omaha Railway Company first mortgage, Series A, 5 per cent, due 2000	45,186,000	
Chicago, St. Paul, Minneapolis & Omaha Railway Company equipment trust 4¾ per cent Series I certificates	128,000	
Indiana Harbor Belt Railroad Company capital stock	1,520,000	
Sioux City Bridge Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	945,800	
Superior Coal Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	2,000,000	
Total		49,883,800
GRAND TOTAL		$135,833,808

If the securities given unconditionally to the Reconstruction Finance Corporation be applied in reduction of the principal of the note of $42,250,133, the principal amount of the debt would then be $40,001,133.

The annual earnings on notes, bonds, and preferred stock, only, of the reorganized company to be received by the Reconstruction Finance Corporation will be $2,633,654, which is the equivalent of 6.584 per cent on the principal amount of the debt, after application of the Union Pacific preferred stock and New York Central bonds unconditionally conveyed, and is equivalent to a return of 5.619 per cent on the principal of the notes so reduced, plus the accumulated interest at the rate named in the notes of $46,935,905. Moreover, when the dividend at 5 per cent on the new common stock allocated to the corporation is added to the foregoing, the total annual earnings from the securities would be $3,796,646, which is the equivalent of 9.49 per cent on the $40,001,133 and of 8.09 per cent on that amount plus the unpaid interest, as of December 31, 1938. After fifteen years the debt to the Reconstruction Finance Corporation will be reduced by the payment of the 15-year secured notes in the amount of $25,000,000, to $15,001,133, exclusive of interest, or $21,935,905, inclusive of interest. The earnings thereafter on bonds and preferred stock will be $1,633,654 annually, which is equivalent to a return of 10.89 per cent on the remaining debt, exclusive of interest, and 7.45 per cent on the remainder of debt, inclusive of interest.

The foregoing is not the entire story of advantage to the Reconstruction Finance Corporation, for it does not include the bonus arising from excess securities allocated to the corporation in the sum of $36,765,103. That sum is the difference between the principal amount of the indebtedness of the Reconstruction Finance Corporation and the total securities allocated to it. Distributing that bonus over the fifteen-year term of the notes produces an annual bonus of $2,451,000, which is equivalent to an annual yield of 5.2 per cent on the original indebtedness.

That additional return, added to the payments of interest and dividends on securities allocated to the corporation, gives it a total annual yield for the fifteen years of 13.3 per cent.

We now make a further analysis of the excessive character of the allocation to the corporation. For each $1,000 of original debt ($1,173 with accrued interest) remaining after reduction of the debt, by applying Union Pacific stock and New York Central bonds, the corporation will receive:

$ 625	in Notes
194	1st Mortgage
303	2nd Mortgage
388	Preferred Stock
580	Common Stock
$2,090	

For each $375 of original debt remaining after the $25,000,000 of 15-year notes are paid, the Reconstruction Finance Corporation will hold $1,465 of securities of the reorganized company, which is at the rate of $3,900 for each $1,000 of the original debt remaining unpaid after fifteen years.

Applying the Union Pacific stock and New York Central bonds leaves the principal amount of the debt at:	$40,001,133
To which should be added unpaid interest to December 31, 1938, of:	6,934,772
	$46,935,905

The Commission allocated new securities:

15-yr. Secured Notes	$25,000,000
1st Mortgage Bonds	7,783,180
2nd Mortgage Bonds	12,114,530
	$44,897,710

which would require only $2,038,195 of preferred stock to bring the amount of securities of the new company to the amount of the unpaid principal and interest of $46,935,905. The plan of reorganization, however, allotted a total of secured notes, bonds, and preferred and

common stock to the new company in the sum of $83,701,008, which is $36,765,103 more than the face value of its claim with interest. When the earnings of the system reach $17,250,000, they will be sufficient to cover all interest requirements and 5 per cent dividends on the preferred stock. That amount of earnings has already been reached. When the earnings reach $23,250,000, there will be sufficient to cover all interest charges and dividends on the preferred and common stock. For the calendar year 1942, after income and all other taxes, Debtor's system earnings were $28,121,321 (Appendix B to Second Motion Further to Supplement the Record). The total earnings on the notes, bonds, and on the preferred and common stock allotted to the Reconstruction Finance Corporation is $3,796,646, which is equivalent to a return of 8.1 per cent on the total amount of the corporation's claim on date of reorganization.

(b) Treatment of other creditors compared with Reconstruction Finance Corporation.

Five per cent notes held by the banks in the aggregate principal amount of $4,439,690, which matured in 1936, had collateral of the Chicago and North Western Railway Company in the aggregate par value of $16,108,000, and Union Pacific Railroad Company preferred stock of $2,085,000, a total collateral of $18,193,000. The Commission authorized the sale of the Union Pacific Railroad Company preferred stock now held by the banks, and the proceeds to be applied to the reduction of the debt. The total amount of the principal and unpaid interest on the bank loans aggregated $5,029,948, so that the Union Pacific stock was considered as equivalent to cash in the sum of $1,733,948. The Commission required that the new notes allotted to the banks should be secured by

collateral in the sum of $18,747,776, of which the first and general mortgage, Series A, bonds and new mortgage convertible, Series A, bonds constituted $7,422,676, and the new preferred and common stock constituted $11,325,100. It was further provided that such securities, if redeemed from pledge through the application of net income or the capital fund, should be cancelled, and no other securities issued on the basis of such redemption other than common stock to the extent of the principal amount of the notes. (Tr. 3608, 3649)

Contrast that treatment with the Reconstruction Finance Corporation loans where the Commission allocated outright to the corporation a total of new securities of $58,701,008 in exchange for collateral of the Debtor in the sum of $49,652,000. (Tr. 3677) No right to redeem the collateral in the sum of $49,883,800 was given, while such right of redemption was given to the reorganized company in the case of the collateral securing the notes given to the banks. (Tr. 3649-50) For each $375 of original debt to the Reconstruction Finance Corporation remaining after the $25,000,000 notes are paid, the corporation will hold $1,465 of new securities, which is at the rate of $3,900 for each $1,000 of original debt remaining unpaid after fifteen years.

Compare the above situation with that of the holders of a $1,000 secured 6½ per cent bond who receive (Tr. 3654):

$250	First Mortgage Bonds @ 4 per cent yield	$10.00
582	Second Mortgage Bonds @ 4½ per cent yield	26.19
537	Preferred Stock @ 5 per cent yield	26.85
51	Common Stock @ 5 per cent yield	2.55
$1420		$65.59

The annual earnings on the foregoing securities are the equivalent of 5.25 per cent on the face value of the 6½ per cent bonds, plus unpaid interest.

Consider also the situation of the holder of a 3½ per cent gold bond who receives (Tr. 3654):

$198	First Mortgage Bonds @ 4 per cent yield	$ 7.92
463	Second Mortgage Bonds @ 4½ per cent yield	20.84
427	Preferred Stock @ 5 per cent yield	21.35
40	Common Stock @ 5 per cent yield	2.00
$1128		$52.11

The annual earnings on these securities are at the rate of 4.62 per cent on the face value of the bond, plus accrued interest.

The banks will receive a 15-year secured note bearing 4 per cent interest for the face of their obligations.

Holders of Sioux City & Pacific bonds and Des Plaines Valley bonds will receive bonds in the face amount of their debt with a 4 per cent return.

The holders of a 5 per cent first and refunding bond will receive (Tr. 3654):

$154	First Mortgage Bonds @ 4 per cent yield	$ 6.16
233	Second Mortgage Bonds @ 4½ per cent yield	10.48
307	Preferred Stock @ 5 per cent yield	15.35
485	Common Stock @ 5 per cent yield	24.25
$1179		$56.24

These annual earnings are the equivalent of 4.8 per cent on the face amount of the bond, plus accrued interest.

Whether the plan be made effective January 1, 1939, or June 28, 1935, the amount which the Commission, under its plan, allocates to the Reconstruction Finance Corporation must shock the conscience of any court. Here is a corporation owned by the United States, organized to help, among others, financially embarrassed railroad corporations. Its aid is supposed to be given without profit. Instead of being an instrument of aid to the weak it becomes an instrument of destruction to prop-

erty values and a burden on the reorganized company. Section 77 requires, before the plan of reorganization can be approved, that the court must find that the provisions of the plan are fair and equitable, that such provisions do not discriminate unfairly in favor of any class of creditors or stockholders and, what is more important, must be compatible with the public interest. Clearly this part of the plan is inequitable, wholly unjustified and confiscatory.

(c) The reorganized company should have the right to redeem collateral of Reconstruction Finance Corporation.

An examination of the plan of reorganization fails to disclose that any right is given to the reorganized company to redeem the collateral now held by the Reconstruction Finance Corporation or allotted to the corporation as security for the $25,000,000 principal amount of secured notes, the latter collateral aggregating $49,883,800, and if to that be added the $2,249,000 of Union Pacific preferred stock and New York Central bonds, the aggregate is $52,132,800. When the Commission came to consider the right of the reorganized company to redeem collateral allocated to the Railroad Credit Corporation and to the banks, conditioned upon serial curtailment of the debt to those two classes of creditors, the Commission gave the right to the reorganized company to redeem such collateral. (Tr. 3648-50) The Railroad Credit Corporation and the banks together are given (Tr. 3607-8) $26,742,657 of collateral plus any balance remaining in the fund contributed under the Railroad Credit Corporation marshalling and distributing plan and to Railroad Credit Corporation, the equity in the collateral securities pledged with Reconstruction Finance Corporation, which was given to secure $3,959,000 of new serial notes. The Railroad Credit Corporation and Reconstruction Fi-

nance Corporation are by Order No. 8 of the District Court in these proceedings placed in one class. (Tr. 54) The discrimination as between these creditors and the Reconstruction Finance Corporation is wholly indefensible. The right of the reorganized company to redeem the collateral given to secure the notes of Railroad Credit Corporation and the banks should be extended to cover the collateral given to secure the notes of the Reconstruction Finance Corporation.

(d) Reconstruction Finance Corporation should not receive any outright unconditional conveyance of securities free of lessening effect on its claim.

We think it sufficient to call the attention of the Court to the fact that the plan of reorganization of the Commission provides in so many words (Tr. 3610) for the outright unconditional conveyance to Reconstruction Finance Corporation of Union Pacific preferred stock, New York Central Railroad Company bonds, and New York Central & Hudson River Railroad Company bonds, aggregating in par value $2,249,000.

As to this objection the District Court simply said (Tr. 5033) that, under the plan, the Union Pacific stock and New York Central bonds "are to be delivered outright to the Reconstruction Finance Corporation in satisfaction of its debt to the extent of the market value of said securities, which market value is said to be approximately $1,600,000." And at Tr. 5034, the District Court said: "As has been indicated the plan does not contemplate that the Union Pacific preferred stock, the New York Central Railroad Company bonds and the New York Central & Hudson River Railroad Company bonds shall be given to the Reconstruction Finance Corporation as a gift as the Debtor contends. It contemplates

that the market value of these securities shall be credited on the Reconstruction Finance Corporation's debt."

It appears from the record that both the Debtor's (Tr. 3528) and the Group Committees' (Tr. 3554) plan provided for sale of Union Pacific stock and New York Central bonds held as collateral and the proceeds to be applied to reduction of debt. In the report of the Commission it is provided that in the case of the bank loans "the Union Pacific stock pledged as collateral should be sold, and the proceeds applied in curtailment of the debt, including principal and interest as contended for by the claimant." (Tr. 3570)

A similar provision is set forth at Tr. 3574, 3608 and 3649.

As to the Reconstruction Finance Corporation, the provision of the Commission's plan is entirely different. That the Commission intended to give to the Reconstruction Finance Corporation possession of the Union Pacific stock and New York Central bonds is clearly indicated by the provision (Tr. 3574): "The Reconstruction Finance Corporation, in addition to the $25,000,000 note heretofore mentioned, should be allotted the Union Pacific stock and the New York Central bonds of two issues it now holds as collateral security, * * *."

At Tr. 3610, the plan provides:

> "All right, title, and interest of the debtor in and to the Union Pacific Railroad Company preferred stock of a par value of $2,085,000, the New York Central Railroad Company 4-percent consolidated bonds due 1998 of a principal amount of $64,000, and the New York Central & Hudson River Railroad Company refunding and improvement 4½-percent bonds due 2013 of a principal amount of $100,000, now pledged with the Reconstruction Finance Corporation, shall be unconditionally conveyed to the Reconstruction Finance

> Corporation. The latter will also receive outright new securities as hereinafter stated of the reorganized company issuable against the mortgage bonds of the debtor's issues now held in pledge by it."

Identical provision is carried in the order approving the plan of reorganization. (Tr. 3651) The plan clearly contemplates that these securities are reduced to possession without reduction of debt due the Reconstruction Finance Corporation. If the Commission had intended these outside collateral should be sold and the proceeds applied to reduction of debt, it would have used the clauses it applied to sale of similar collateral held by the banks which were to be sold and the proceeds applied to reduction of debt.

These securities should be credited on the indebtedness of the Debtor to the Reconstruction Finance Corporation if sold by the latter, and if not so sold should be embraced in the collateral provided as security for the fifteen-year notes.

(e) The proposed agreement submitted under date of July 19, 1940, by the Reconstruction Finance Corporation for release of all securities of the reorganized company by payment of a cash sum, is evidence of the excessive character of the securities allotted to the Reconstruction Finance Corporation.

Counsel for the Reconstruction Finance Corporation, at the hearing before the District Court on the approval of the plan, distributed a copy of a letter to the District Court, dated July 19, 1940, from the secretary of the Reconstruction Finance Corporation, to which was attached a form of agreement which had been approved by the directors of that corporation for execution upon final confirmation of the plan of reorganization in the report and order of the Commission here under consideration. (Tr. 4943)

That form of agreement is set forth in the record (Tr. 4944-5); under its provisions the Reconstruction Finance Corporation agreed to surrender to the reorganized company or to transfer or deliver to the nominee thereof, (a) all the new securities which it is to receive under the plan, excepting the new secured notes, of a par value or stated value aggregating $58,701,008; and (b) would also deliver Union Pacific Railroad stock of a par value of $2,085,000, and New York Central Bonds of a par value of $164,000. In exchange for these securities the Reconstruction Finance Corporation must be paid an amount of money calculated as follows: $42,250,133 principal amount plus accrued and unpaid interest to June 28, 1935, plus interest on said amount at 4 per cent per annum from June 28, 1935, to the date of payment, less (1) all dividends, interest, and other payments received between June 28, 1935, and January 1, 1939, by the Reconstruction Finance Corporation on account of the collateral pledged with the corporation by the Debtor to secure such indebtedness; (2) the net proceeds, if any, of liquidation of such of the new securities and such of the old securities as shall have been sold to the date of tender and payment, plus dividends and interest received by the Reconstruction Finance Corporation from January 1, 1939, to that date; and (3) the principal amount of the new secured notes due January 1, 1954, plus the interest and principal payments received by the Reconstruction Finance Corporation thereon, to date of tender and payment.

Counsel for the Reconstruction Finance Corporation stated at the hearing that the Reconstruction Finance Corporation stood ready to enter into the agreement pursuant to which "if the RFC received the securities under the plan, it would not make a profit therefrom." (Tr. 4942)

The amount due Reconstruction Finance Corporation, principal and interest at four per cent, as of December 31,

1942, is $48,322,687. Elsewhere we have shown that after payment of this debt there would be left in the treasury of Debtor's estate the sum of $33,000,000 in cash, as well as material and supplies now on hand, and other assets ample to serve the public.

That the District Court was of the opinion that were cash available the claim of the Reconstruction Finance Corporation might be paid in cash, appears from the statement (Tr. 5033): "Payment in cash is impractical as to the claim of the Reconstruction Finance Corporation. Cash is not available."

Objection No. 7. Duplication in allowances for interest on Reconstruction Finance Corporation claim.

As appears at Tr. 3627 and 3628, mortgage bonds of the Debtor pledged with the Reconstruction Finance Corporation aggregated $49,652,000 principal and $9,056,077 unpaid interest at December 31, 1938, or a total of $58,708,077. The Commission's plan (Tr. 3704), provides that new first and general mortgage bonds, Series A, second mortgage convertible income bonds, Series A, preferred stock, and common stock, will be distributed as shown in the table on said page, for each $1,000 bond or debenture, with all interest coupons maturing subsequent to June 28, 1935, attached, outstanding or pledged.

The following table correctly states the securities pledged to the Reconstruction Finance Corporation and the distribution of new securities to be given in exchange for such pledged securities (Tr. 4322):

Par Value Pledged		New Securities					
		First and Gen. Mtge. bonds Series A	Sec. Mtge. Income Series A	Preferred stock	Common stock (stated at $100 per share)	Total	
$ 1,976,000	Gen. Mortgage 4½% bonds	$ 405,080	$ 944,528	$ 869,440	$ 82,992	$2,302,040	$
19,502,000	First and Refunding Mortgage 4½% bonds	2,964,304	4,485,460	5,889,604	9,302,454	22,641,822	1
13,174,000	First and Refunding Mortgage 5% bonds	2,028,796	3,069,542	4,044,418	6,389,930	15,532,146	1
15,000,000	First and Refunding Mortgage 6% bonds	2,385,000	3,615,000	4,740,000	7,485,000	18,225,000	1
$49,652,000	Total	7,783,180	12,114,530	15,543,462	23,259,836	58,701,008	9

The bonds of the Debtor held as collateral by Reconstruction Finance Corporation are treated under the plan in identically the same manner as bonds owned by the insurance companies, and new securities are authorized for the interest coupons, as well as the principal of the bonds, during the period prior to the effective date of the plan; the amount of new securities for coupons on collateral held by Reconstruction Finance Corporation is $9,049,008. At the same time, the plan provides securities of the new company to go to Reconstruction Finance Corporation for the full amount of the accrued unpaid interest of $6,934,772 on the debt due the Reconstruction Finance Corporation of $42,250,133, at the rate of interest named in the notes for the period prior to January 1, 1939. (Tr. 3627)

Objection No. 8. Alternative treatment of Reconstruction Finance Corporation.

This objection sought modification of the plan so as to provide for the claim of the Reconstruction Finance Corporation, either by issuing notes for the full amount of

the claim as of the effective date of the plan, or by issuing new securities for a portion of the claim, the balance to be represented by serial notes. (Tr. 4006-8)

The District Court discussed this suggested modification of the plan and found it not to be beneficial and that even if it were assumed that the alternatives were fair and equitable to all parties in interest, it did not follow that they or either of them should be substituted. (Tr. 5035)

In the motion to supplement the record and in the two subsequent motions seeking to embody in the record the change in the financial condition of the Debtor's estate, suggestion is respectfully made that whatever disposition is made of the petition for writs of certiorari, such should be without prejudice to the right of the District Court and the Interstate Commerce Commission to consider a change in the plan of reorganization which will permit the payment of the claim of the Reconstruction Finance Corporation in whole or in part, and modification of the plan to give effect to such payment. The plan of reorganization allocates to the Reconstruction Finance Corporation $135,833,000 of securities of the new company. The debt to the Reconstruction Finance Corporation, principal and interest at four per cent, as of December 31, 1942, is $48,323,687. As appears from the Second Motion Further to Supplement the Record, Appendix D, Debtor's estate on March 18, 1943, had $75,892,529 in cash available for payment of said debt. Full payment of the claim of the Reconstruction Finance Corporation would release securities of the reorganized company allocated with full ownership in Reconstruction Finance Corporation in the sum of $83,701,008, securities given unconditionally to Reconstruction Finance Corporation in the amount of $2,249,000, and release of collateral given to secure the 15-year notes allocated to the Reconstruction

Finance Corporation, the aggregate of which is $49,883,800, making a grand total of $135,833,808. Such released securities would be available for distribution to creditors and stockholders of the Debtor corporation, thereby strengthening the position of senior creditors, giving to junior creditors full allowance for the amount of their claim and leaving a substantial amount of securities for preferred and common stockholders of the Debtor corporation.

In the Motion to Supplement the Record dated December 17, 1942, at pages 12-13, will be found a statement of the purposes for which the Interstate Commerce Commission authorized loans by the Reconstruction Finance Corporation to the Debtor. These loans provided funds which benefited all creditors at the time; the payment of the loans at the present time would not in any wise transgress the rule of priorities of the *Boyd* case and the rule as to participation by junior interests of the *Consolidated Rocks Products* case.

Objection No. 9—Finance Committee.

The basis of this objection is that in this respect the plan deprives the Board of Directors of the reorganized company of the right and duty appertaining to the board of directors of a corporation to manage the property, and places such management in two persons on the finance committee. The details of this objection are more fully set forth in the transcript at page 4008. The District Court overruled this objection for reasons stated. (Tr. 5035)

Objection No. 10—Voting Trust.

The objections to the voting trust are set forth at Tr. 4009 and are based on the contention that a court cannot give a minority control of a corporation, nor can it set up

such a trust over nonconsenting persons in interest. The District Court overruled this objection. (Tr. 5035)

In the *Western Pacific* decision this Court refers to the creation of a voting trust provided for in that plan of reorganization but did not express any views as to the legality of such a trust.

Objection No. 11—Reorganization Managers.

This objection is set forth in detail at Tr. 4009.

The District Court stated that it was strongly in sympathy with this objection but overruled the objection because (Tr. 5036):

> "The delays which may result and cannot be prevented by the court will probably not be greater than the delay which would result from sending the plan back to the Commission."

However, the District Court went on to say:

> "The court does protest. It is charged with responsibility for promptly completing the reorganization and the provision of the plan under consideration deprives it of power to compel the reorganization promptly to be completed."

The reorganization managers should be appointed by, and be solely under the control of, the court; the Commission having created the plan, it should permit the court to put it into effect through reorganization managers of the court's own selection.

Objection No. 12—Rehabilitation Program.

The basis for this objection is set forth at Tr. 4010-11. The District Court overruled it, holding the provision to be a wise one. (Tr. 5036)

Suffice it to say that the setting aside of $26,200,000 of

new securities out of a maximum new capitalization, deprives creditors not provided for in the plan of the application of that amount of new securities. The maximum capitalization contemplated existing assets. Cash or its equivalent will be added to the assets by issuing the $26,000,000 of bonds and stock.

Objection No. 13—Earnings in Normal Year, and Objection No. 14—Additional Prospective Earnings Not Considered by the Commission.

These objections challenge the judgment of the Commission as to the prospective earnings of the property for which the capitalization and character of interest thereon were determined by the Commission, the District Court agreed with the Commission's views. (Tr. 5044)

In the *Milwaukee* and *Western Pacific* cases, the Court was careful to limit its findings approving the Commission's plan of reorganization to the circumstances shown of record in those two cases. Petitioner insists that for the reasons stated in its objections (Tr. 4011-13) and in the light of subsequent developments, at least the Commission should be given an opportunity to state whether it now should modify its findings as to the prospective earnings of Debtor's estate. Circumstances peculiar to the petitioner's estate and the enormous increase in earnings over those forecast by the Commission, require that the plan should be returned to the Commission with directions promptly to appraise the earnings situation in the light of the changes which have occurred since the date of the closing of the record before the Commission. It well may be that only a small part of Debtor's system is handling war material and therefore reflects "the bulge of war earnings."

Objection No. 15—Common Stock Reserved for General Creditors.

The basis for this objection will be found at Tr. 4013. More common stock was reserved for general creditors than would be required to be issued to cover allowed claims on the basis stated in the plan. The excess should be provided to be available for the debenture holders.

Objection No. 16—Debtor's Pension System.

The opinion of the District Court sustained the objection that the plan of reorganization failed to make provision for the pension system and it required the continuance of such system by the reorganized company. We doubt the correctness of the District Court in thus modifying the plan of reorganization without returning it to the Commission for specific action. As this Court said in the *Western Pacific* case, a District Court "may veto the plan in its entirety but may improve it only by suggestion." The District Court had no power to add the pension system to the plan of reorganization. Only the Commission could do that and the plan should have been returned to it for that purpose.

Objection No. 17—Determination of Value of Debtor's Properties.

This objection as well as the appeal from the order of the District Court of October 12, 1940, refusing to remand the proceedings to the Interstate Commerce Commission for a determination and certification of value of Debtor's properties is perhaps disposed of by the opinions of this Court in the *Milwaukee* and *Western Pacific* cases, but we mention it here because we felt there was much more merit in the case of the North Western's situation than existed with those two railroads.

Objection No. 18—Refusal of Commission to Consider Plan of Consolidating Properties of Debtor and Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

The details of this objection will be found at Tr. 4014-15. The basis for this objection is that consolidating the properties of the debtor and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company would bring about vast economies, and that the net income available for fixed charges of such a consolidated company would be ample to meet all the requirements of the obligations of the consolidated companies and to pay dividends on capital stock of that company. The Commission should have reopened the proceedings to explore and determine the desirability of such a consolidation before preparing separate plans of reorganization of each of the two companies. The part of the District Court's opinion overruling this objection is found at Tr. 5045.

The modifications in the plan of reorganization made by the District Court should have been referred to the Interstate Commerce Commission for embodiment in such plan.

The District Court in its findings and decree approving the plan of reorganization on October 12, 1940 (Tr. 5072, 5083-85), modified the plan of reorganization as certified to it by the Interstate Commerce Commission but did not remand the proceedings to the Commission for its reconsideration of such modifications of that plan of reorganization, as required by Section 77(e) of the Bankruptcy Act. These modifications in the plan of reorganization are:

(a) The claim of Railroad Credit Corporation as of December 31, 1938, is the principal of two notes aggregating

$653,681 and accrued interest of $9,805, a total claim as of said date of $663,486. The plan of reorganization as approved by the Commission gave Railroad Credit Corporation new 10-year serial secured notes in the approximate amount of $663,000 bearing 4 per cent interest, dated January 1, 1939, payable in 10 equal installments. These notes were to be secured by pledge of collateral of a par value of more than $8,000,000. (Tr. 3648)

The District Court modified the plan so that the claim of the Railroad Credit Corporation was provided to be disposed of by purchase or payment of $300,000 in cash at the time of the transfer of the property of the Debtor to the reorganized company with a note of the reorganized company for the balance then due with interest. The details of the modification are shown in paragraph 20 of the District Court's decree. (Tr. 5083)

(b) Further modifications were made by the District Court under a finding that there are "certain minor defects or omissions in the plan as certified by the Commission." The District Court broadened the scope of the applicability of the section of the plan entitled "Claims not affected by plan," which limited the payment to such claims as have been "allowed" (Tr. 3654-5), by striking out the words "to the extent allowed," in the first line of the section of the plan entitled "Claims not affected by plan," and adding at the end of said section a paragraph to read as follows (Tr. 5084):

> "The reorganized company shall have authority to pay, when determined to be valid, all loss and damage, overcharge and reparation claims, and interline account and other claims of carriers."

(c) A further modification under the finding of "minor defects or omissions" is the incorporating in the

plan of a provision whereby the reorganized company may disaffirm contracts or leases made by the Debtor or successive trustees during the process of reorganization without specific authority of the court. No such provision is contained in the plan of reorganization certified by the Interstate Commerce Commission. The District Court decree inserts in the plan the following provision (Tr. 5084):

> "The reorganized company, within six months after the entry of final decree in these proceedings, may disaffirm contracts and leases of the Debtor or the Trustee entered into after June 28, 1935, except such contracts and leases which shall have been made binding upon the reorganized company by orders heretofore entered by the Court. As to the contracts made binding upon the reorganized company by specific orders of the Court, there shall be no right to disaffirm."

(d) A further modification of the plan curing a "minor defect or omission" in the plan as certified by the Commission was made by the District Court by incorporating in the plan the following provision (Tr. 5084-85):

> "The reorganized corporation shall assume the payment of pensions theretofore granted to employes by the Debtor or by the Trustee, and being paid by the Trustee, as of the date of the transfer of the property by the Trustee to the reorganized corporation."

To the foregoing modifications and additions to the plan, no separate objections were made by any of the parties in interest. (Tr. 5085)

Section 77(e) provides that if the judge shall not approve the plan he shall file an opinion stating his conclusions and the reasons therefor, and he shall enter an order in which he may either dismiss the proceedings or refer them back to the Commission for further action.

In the Debtor's Statement of Points on Appeal, an

error was assigned as to this particular matter as follows (Tr. 5111):

> "18. The Court erred in altering the plan of reorganization as certified by the Interstate Commerce Commission by attempting to supply omissions and cure defects through the addition of particular provisions supplied by the Court.
>
> "19. The Court erred in approving the plan of reorganization as certified by the Interstate Commerce Commission, as modified."

On June 23, 1941, counsel for the Debtor filed a motion in the District Court (Tr. 5562) to remand the case back to the Commission for further proceedings, including, among other matters, the consideration of the modifications here under discussion.

This matter was not specifically passed upon by the Circuit Court of Appeals in its opinion below.

In the opinion in the *Western Pacific* case, in discussing the relative powers and duties of the Commission and the District Court, this Court held that a District Court "may veto the plan in its entirety but may improve it only by suggestion." So we say that, notwithstanding the improvements which the modifications made by the District Court may make in the plan of reorganization, such plan of reorganization must be returned to the Commission with suggestions that the modifications approved by the Court be incorporated in the plan.

Claims for Equitable Treatment.

The claims for equitable treatment are set forth at Tr. 4015-4016. The most important perhaps, in view of the decisions of this Court above referred to, is the claim that the effective date of the plan for reorganization of the Debtor should be fixed at June 28, 1935.

The effective date of plan of reorganization herein should be fixed at June 28, 1935.

The Commission fixed the effective date of the plan of reorganization as of January 1, 1939. The Commission's reasons for that conclusion are stated in the record. (Tr. 3566) The Commission feared that because of the small amount of cash on hand and the lack of prospect of substantial increase in cash to meet the requirements on the new securities, the effective date should not be earlier than January 1, 1939. The District Court overruled petitioner's contention against this. (Tr. 5045-6)

The change in cash position of the Debtor and its subsidiaries is now such that the plan of reorganization can be made effective as of the date of bankruptcy, June 28, 1935, and all of the requirements of the plan be complied with in cash, without impairing the ability of the new company to perform all of its services as a common carrier. As of March 18, 1943, cash available, Items 708, 709, and 711 (see Appendix A to Second Motion Further to Supplement the Record) aggregated $75,892,529; current assets of the system as of December 31, 1942, aggregated $93,363,878.

During the period of trusteeship to January 31, 1943, as appears from Appendix C to the Second Motion Further to Supplement the Record, payments have been made in cash as redemption of debt aggregating $24,326,699, and payments of interest have been made in cash in the aggregate sum of $22,289,417, a total, debt and interest paid in cash during the trusteeship, of $46,616,117.

In addition to the cash payments referred to, the debt has been reduced by application of collateral income in the amount of $1,120,893, and interest in the sum of $4,416,038, a total by application of collateral income of $5,536,931.

In view of the cash position of the system and the changed conditions in the financial status of the Debtor's estate since the plan of reorganization was approved by the Commission, the effective date of reorganization as of June 28, 1935, is feasible and desirable, and the plan of reorganization should be returned to the Commission with directions to consider such modification in the effective date as to the Commission seems proper.

This matter of effective date of the plan was discussed by this Court in both the *Milwaukee* and *Western Pacific* cases. In the *Western Pacific* case it was stated:

> "*Effective Date of Plan.* January 1, 1939, was chosen as the effective date of the plan. The debtor objects to this on the ground that subsection (1) fixes the date of filing the petition as the date for the plan.[39] The practical result of the debtor's argument is to make the interest rate of the new securities applicable from August 2, 1935, instead of from January 1, 1939. As the new securities bear lower interest rates than the contract securities, a savings to the estate would accrue.[40] But we are of the opinion that the provisions of subsection (b) are sufficiently broad to empower the Commission to select the date for the institution of the reorganization. Cf. *Group of Industrial Investors* v. *C. M. St. P. & P. R. R. Co.*, Nos. 11-19, 32, 1942 Term, decided this day, slip opinion p. 14."

In the *Milwaukee* case it was stated:

> "Finally, it is argued on behalf of some of the stockholders that the effective date of a plan promulgated under § 77 must be the date of the filing of the petition, the theory being that § does not permit the accrual of interest after that date. In *Consolidated Rock Products Co.* v. *DuBois*, we held that under § 77B interest on secured claims accrued to the effective date of the plan was entitled to the same priority as the principal. See

> 312 U. S., p. 514, note 4, p. 527, and cases cited. The definition of the terms 'creditors' and 'claims' was substantially the same under § 77B(b) as it is under § 77. We see no reason why the same result should not obtain here."

It may well be that some of the parties to those two cases may file petitions for rehearing on this particular phase of the decisions. We say that, with utmost respect, because to us there appears to be conflict between what was stated, as above quoted, and the provision of Section 77 (l), which is as follows:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The legislative history of Section 77 throws some light upon the matter.

As the section stood prior to August 27, 1935, it defined, in paragraph (b), the terms "securities," "stockholders," and "creditors," the latter being defined as follows:

> "The term 'creditors' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests or securities would otherwise constitute provable claims under this Act."

There is in the whole section as it read prior to August 27, 1935, no definition of "claims."

When the 1935 amendments were being considered, they were originally presented in the House, in the form of H.R. 6249, introduced by Mr. Sumners of Texas on February 27, 1935. This bill not only defined "securities," "stockholders," and "creditors," but also added a definition of "claims," as follows:

> "The term 'claims' includes debts, securities other than stock and option warrants to subscribe to stock, liens, or other interests of whatever character."

After several public hearings by the House Committee on Judiciary in April, 1935, and further consideration, the bill was revised in many particulars and re-introduced by Chairman Sumners, of the Judiciary Committee, on June 20, 1935, as H. R. 8587, accompanied by Committee Report No. 1283, 74th Congress, 1st Session. The new bill contained definitions of "securities," "stockholders," "creditors," and "claims," "claims" being defined as follows:

> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character, *including interest thereon accruing after the filing of the debtor's petition.*" (Our italics.)

(See H. R. 8587, p. 8, lines 18 to 22, inclusive, Committee Report No. 1283, p. 12, par. (2).) It will be seen that the Committee had slightly changed the language of the original draft, and had added the words which we have italicized.

When this bill was reached for consideration in the House, the Judiciary Committee, through Chairman Sumners, introduced certain Committee amendments, including the following:

> "Page 8, line 21, after the word 'character' strike out the remainder of the sentence."

This amendment was agreed to (Congressional Record, August 15, 1935, p. 13777, column 2).

In other words, that part of the definition of the term "claims" reading "including interest thereon accruing after the filing of the debtor's petition" was stricken out, so that the section now provides:

> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Congress has, therefore, by its expressed intention, eliminated from the definition of the word "claims" all interest accruing after the filing of the petition. No case of legislative intent could be clearer.

There is ample authority for the position that such amendatory action in the process of the passage of the bill (there being therein no other clear language to the contrary) is equivalent to a provision that no such interest shall be included. If there were in the bill clear language indicating that, contrary to bankruptcy practice, interest during administration should be incorporated as part of a creditor's claim, the situation would be different. There is no such language in Section 77, and, in the light of the legislative amendment, no such recognition of interest can be implied.

In *Carey* v. *Donohue*, 240 U. S. 430, Justice Hughes stated the rule (page 436):

> "* * * we are not at liberty to supply by construction what Congress has clearly shown its intention to omit."

See also *U. S.* v. *Delaware & Hudson Co.*, 213 U. S. 336, 414; *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, 198.

We believe that Section 77(l) contemplates that the rights of creditors shall be determined as of the basic date, *i. e.*, the date of filing and approval of the petition for reorganization. On that day the Debtor's petition was filed. The relative rights of all parties interested in Debtor's property are to be determined as at the basic date and the new securities issued in accordance with that determination. Thereafter there can be no further accrual of interest in accordance with the pre-existing contracts. New contracts are substituted as of that date which wholly supersede pre-existing ones. The amount of cash available from earnings determines whether debt securities shall bear fixed or contingent interest from that date.

Whether we are correct in our contention that Section 77(l) requires the plan of reorganization to be made effective as of the date of filing the petition for reorganization, it is clear that the reason given by the Commission for fixing January 1, 1939, as the date of reorganization no longer exists. The proceedings should be remanded to the Commission with directions to consider anew, in the light of the changed financial position of the Debtor's estate, what the effective date of the plan of reorganization should be. Certainly, the Commission is in a position to determine whether there is now an ample supply of cash, not only to meet the terms of the plan of reorganization effective as of June 28, 1935, and the operating requirements of Debtor's property, but also to pay off the claims of Reconstruction Finance Corporation.

Confirmation of the Plan.

The instant case differs from the *Milwaukee* and *Western Pacific* cases in that here we have confirmation after a vote of creditors, by the decree of the District Court

entered on June 27, 1941 (Tr. 5591-6), and approval of that order of confirmation by the Circuit Court of Appeals. (Tr. 5805-5813) Neither the Milwaukee nor the Western Pacific had reached the stage where the plan of reorganization was submitted to the vote of the creditors.

On pages 36 to 41 of the Debtor's Petition for Writs of Certiorari, we set forth the facts of record and the reasons why we think the court erred in substituting the results of balloting by creditors for the informed independent judgment of the Court as to whether the plan of reorganization is fair and equitable. The Circuit Court of Appeal's action was squarely in conflict with the decision of this Court in *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, where it was held that it is the duty of the court to use its informed independent judgment in determining whether a plan of reorganization is fair and equitable, and that such court ought not surrender that duty to the judgment of creditors voting on the plan.

We ask this Court to note the argument on this point in our brief in support of the petition for writs of certiorari. On that ground alone certiorari should be granted.

The tax burden vitally affects the plan of reorganization and should be further considered by the Commission.

In the opinion of this Court in the *Milwaukee* case, reference is made to the great increase in taxes (page 3, printed opinion of Mar. 15, 1943) where it is further said:

> "In addition to the increase in tax rates, of which we cannot be unmindful, there is the likely increase of the total tax burden occasioned by the conversion of debt into stock. It is estimated by certain bondholders that by reason of this fact a full dividend could not be paid on the new preferred stock and no

dividend could be paid on the new common stock even on the basis of earnings as great as those for 1941. In view of these considerations we cannot say that the junior interests have carried the burden which they properly have of showing that subsequent events make necessary a rejection of the Commission's plan.

"But it is suggested that the vice of the Commission's plan is the formulation of a capital structure which as a result of conversion of debt into stock so increases the impact of mounting taxes on the company as to deprive junior interests of net earnings which would be available for distribution to them if the ratio of debt to stock were increased. Such a conversion of debt into stock is said to be entirely unnecessary to the formulation of a sound plan and results in unfairness to junior interests. The difficulty with that argument is that Congress has entrusted the Commission not the courts with the responsibility of formulating a plan of reorganization which 'will be compatible with the public interest.'"

The Commission could not foresee the tremendous impact of taxes on the Debtor's estate when the property passes to the custody of the reorganized company because the present tax law was not then on the statute books.

Counsel for the Debtor is apprehensive that a similar result may be expected by the reorganized company on the actual earnings' results for the year 1942. As counsel for the Debtor computes the taxes on the earnings for 1942, if the plan becomes effective on January 1, 1939, the reorganized company would be compelled to pay a normal income tax of $8,895,000 and an excess profits tax of $510,000. If the Debtor company with its present security holders was the taxpayer, it would be compelled to pay on the earnings for 1942 a normal income tax of $6,120,000 and no excess profits tax. Thus it will be observed that there is grave danger that the reorganized company will be compelled to pay many millions

of dollars annually in the way of Federal income taxes, of which the Commission could have had no knowledge at the time it approved the plan of reorganization, which would not be required under a modified plan.

We recognize that the matter of taxes is an element of consideration, as was pointed out by this Court in the *Milwaukee* opinion, by the Commission in determining a plan of reorganization compatible with public interest. The changed conditions consisting of largely increased earnings and change in tax rate and base could not be foreseen by the Commission. The proceedings should be remanded to the Commission for further consideration of the tax problem, as the present plan of reorganization is no longer feasible when considered under present tax laws.

Conclusion.

The objections to the plan of reorganization in the Chicago and North Western Railway Company proceeding are important, affecting vast properties, and many people. None of these issues has been decided by this Court. Similar questions will arise in other reorganization proceedings. Decision on these issues in the instant case will be "in the interest of advancing the solution of" many problems of reorganization in other cases now pending throughout the country.

We earnestly pray that the writs of certiorari herein sought be granted and that full opportunity be given to the parties to this proceeding to present in an orderly manner, upon brief and in oral argument, to this Court their views and contentions.

Respectfully submitted,

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor,
Petitioner.

Dated at Chicago, Illinois, this 1st day of April, 1943.

MAR 5 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 37-38

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY CO.,
Debtor,

LOUIS SUSMAN, et al., Convertible Bond Owners,
Petitioners,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE,
ET AL.,
Respondents.

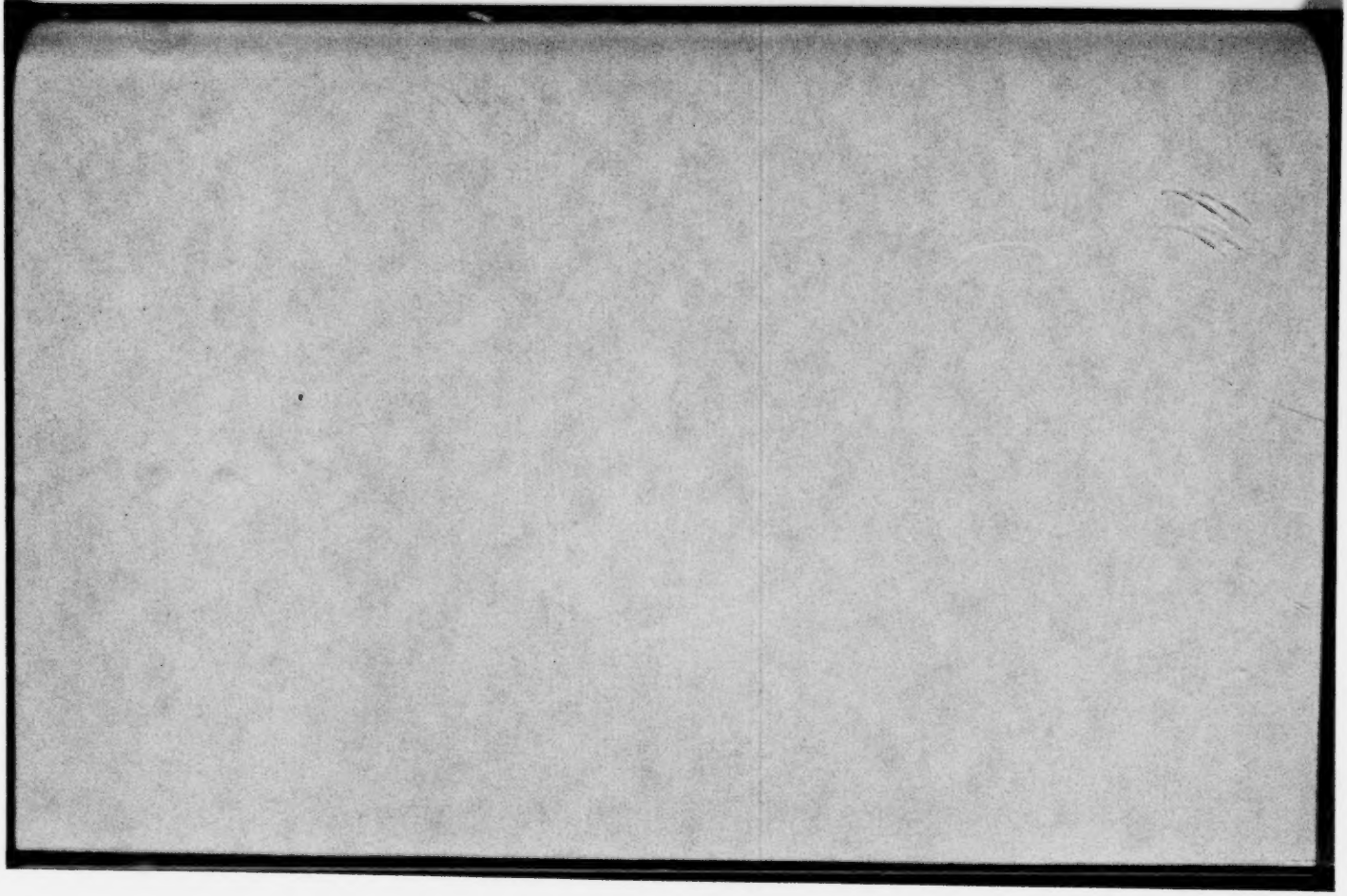
On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION AND SUGGESTIONS IN SUPPORT OF MOTION.

MEYER ABRAMS,
Counsel for Louis Susman, et al., Convertible Bond Owners, Petitioners.

SHULMAN, SHULMAN & ABRAMS, and
NORMAN ASHER,
134 N. LaSalle Street,
Chicago, Illinois,
Of Counsel.

March 2, 1943.



In The

Supreme Court of the United States

October Term, 1942.

Nos. 37-38

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY CO.,
Debtor,

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Petitioners,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION TO ADOPT THE SUPPLEMENTAL RECORD, AS PRESENTED BY THE DEBTOR IN CASES NOS. 34-35-36, AS PART OF THE RECORD ON PETITIONERS' APPLICATION AND TO BE CONSIDERED IN CONNECTION WITH POINTS II AND III OF THE BRIEF.

Now comes petitioners, Louis Susman, et al., Convertible Bond Owners, and move that the supplement to the record, consisting of the documents mentioned in Debtor's

motions of December 17, 1942 and February 23, 1943 respectively, in Nos. 34-35-36, be adopted and considered as part of the record on petitioners' application for a Writ of Certiorari in connection with Points II and III of Petitioners' Brief, as per suggestions annexed.

MEYER ABRAMS,
Counsel for Louis Susman, et al.,
Convertible Bond Owners,
Petitioners.

SUGGESTIONS IN SUPPORT OF MOTION.

The Debtor filed a motion in cases Nos. 34-35-36, dated December 17, 1942, and a further motion dated February 23, 1943, for leave to supplement the record to indicate the earnings of the Debtor and its cash position up to December 31, 1942. It appears from that supplemental record that the Debtor has sufficient funds to pay the entire indebtedness of the Reconstruction Finance Corporation, amounting to $48,322,687.00, including the principal and interest at 4%, and will still have ample working capital to maintain and operate the property of the Debtor now in control of the Trustee. Appendices A and B to the Debtor's motion of February 23, 1943, show that the items of cash and special deposits aggregated, as of December 31, 1942, $64,439,509.00.

Point II of the brief in support of the petition in the instant case urged upon this Court that the Convertible Bonds were entitled to a lien on the Omaha bonds aggregating $45,186,000.00, which were pledged as security by the Debtor with the Reconstruction Finance Corporation. It was urged that the Debtor wrongfully pledged this security with the Reconstruction Finance Corporation, when such bonds belonged to the Convertible Bond Owners, and that if the pledge be deemed proper, the Convertible Bond Owners should be entitled to any equity, after payment of the debt to the Reconstruction Finance Corporation. Now it appears that there is sufficient money to discharge the whole debt, and the point made by the petitioners in their brief on the right of the Convertible

Bond Owners to be subrogated has much greater force. We ask this Court, therefore, to consider the status of the cash position of the Debtor, as of the present date, in connection with the argument in the petition on the right of subrogation, irrespective of the affirmance of the plan in all other respects. (See our brief, pp. 22-41.)

The supplemental record may be added at this stage of the proceeding, for the reason that this is a bankruptcy case and no rights of third persons have intervened or become vested:

Pfister v. *Northern Illinois Finance Corp.*, 63 S. Ct. 133;

Denholm & McKay Co. v. *Commissioner of Internal Revenue*, 132 Fed. (2nd) 243.

Furthermore, the greatly improved position of the Railroad, both as to assets and also as to income, entitled the Convertible Bonds to full, or certainly to increased participation in the reorganized property. (Point III, pp. 42, 43, Petitioners' Brief.)

Respectfully submitted,

MEYER ABRAMS,
Counsel for Louis Susman, et al.,
Convertible Bond Owners,
Petitioners.

SHULMAN, SHULMAN & ABRAMS, and
NORMAN ASHER,
Of Counsel.

Office - Supreme Court, U. S.
FILED
APR 8 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 37-38

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY CO.,
Debtor,
LOUIS SUSMAN, et al., Convertible Bond Owners,
Petitioners,

VS.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE THE ANNEXED ADDITIONAL BRIEF IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI.

MEYER ABRAMS,
Counsel for Louis Susman, et al., Convertible Bond Owners, Petitioners.

SHULMAN, SHULMAN & ABRAMS, and
NORMAN ASHER,
134 N. LaSalle Street,
Chicago, Illinois,
Of Counsel.
April 1, 1943.

Midwest Law Printing Co., 340 W. Huron St., Chicago

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 37-38

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY CO.,
Debtor,
LOUIS SUSMAN, et al., Convertible Bond Owners,
Petitioners,

VS.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE THE ANNEXED ADDITIONAL BRIEF.

Now come Louis Susman, *et al.*, holders of Convertible Bonds, Petitioners herein, by Meyer Abrams, their attorney, and move for leave to file instanter the annexed additional brief in support of the petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MEYER ABRAMS,
Attorney for Louis Susman, et al.,
Convertible Bond Owners,
Petitioners.

ADDITIONAL BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

PRELIMINARY STATEMENT.

The two decisions rendered by this Court on March 15, 1943 in the Chicago, Milwaukee, St. Paul & Pacific Railroad Company Reorganization, and in the Western Pacific Railroad Corporation Reorganization, make it necessary for us to apply for leave to file an additional brief, in view of the position taken by this Court on certain matters which are also involved in the reorganization of the debtor.

We also desire to bring to the attention of this Court that as attorneys for the Adjustment Mortgage Bondholders in the Milwaukee Reorganization case, we intend to file a Petition for a Rehearing, and the matters to be presented in such petition are also pertinent on the issues raised in the instant case, and to avoid repetition, we will ask this Court to consider the points raised in the Petition for Rehearing in connection with the application for Writs in this case.

I.

While The Changed Conditions By Reason Of War Earnings May Not Be Considered To Change The Speculative Normal Year, They Should Be Considered To Change The Allotment To The Convertible Bonds Because Of The Actual Increase Of The Assets Resulting From The Increased Revenue Already Received.

This Court determined in the *Milwaukee* case that there was no sufficient showing of changed conditions as a

result of war earnings to affect the "normal year" to *speculate* on an increase in the capitalization. The Debtor filed three motions to consider the changed conditions, and we filed a motion to adopt the Supplemental Record in connection with our petitions for Writs of Certiorari which are pending here.

We are not asking this Court to consider the changed conditions for *speculative* purposes to change the "normal year" in order to allot securities on such *speculation,* but to consider the changed conditions for the purpose of allotting additional stock in the amount of $40,790,912, which the Commission failed to issue because of its capitalization, which was based on the then existing assets of the Debtor. The Debtor's assets *are now increased from the earnings by assets in excess of that amount.*

The capitalization was based on the 1937 total assets of $682,170,380. The net assets as of 1943 amount now, as a result of *actual earnings,* to $742,747,217, being an *increase of* $79,577,937, as shown by Exhibit "A" attached to the Debtor's Motion of March 20, 1943. Regardless, therefore, of the question whether the changed conditions are sufficient to change the capitalization on a speculative "normal year," *there is a sufficient showing to increase the allotment* to the convertible bond owners for their deficiency in excess of $40,000,000 under the present plan.

The plan of reorganization fixed the maximum limits of capitalization at $449,974,309, but the Commission authorized the issuance of only $423,774,309 of the new securities in exchange for the old securities, so that *this latter figure must be taken as its valuation of the assets.*

The current assets upon which the valuation was based in 1937 were $24,293,616. These increased to $28,533,540

on February 29, 1940 (R. 1469), and increased on January 31, 1943 to $89,009,584 (See Debtor's Supplemental Record). The increase in the "current assets" *of over* $60,000,000, and the increase in the *physical assets* of over $79,000,000, warrants the issuance of additional securities required to take care of the $40,790,912 of Convertible Bonds for which no allotment was made under the present Plan (R. 3677).

It should be also be considered that during the bankruptcy proceedings and subsequent to the adoption of the Plan, there has been redemption of debts in the amount of $25,457,592 and payments of interest totaling $26,705,455.

These changes in the financial *liquid* position and assets which are not based on a speculative "normal year," but on *actual increase in assets,* warrant remanding the proceedings to determine whether in the opinion of the Commission modification should be made in the Plan, insofar as it affects the Convertible Bonds.

II.

There Is No Basis For The Low Capitalization Of $423,774,309.

The conclusion of this Court in the *Milwaukee* case that the capitalization amounts to a valuation of the securities to be issued should be considered in connection with the action of the Commission taken in 1934 shortly before the Debtor filed its reorganization petition, when it reached a different conclusion as to the valuation. (*Chicago & North Western Railway Company Reconstruction Loan,* 202 I. C. C. 347.) There the Commission said:

> "It is reasonably capitalized, as evidenced by an investment of approximately $643,518,851 and capital

liabilities in the amount of $527,688,900. Its corporate surplus on December 31, 1933, was $39,387,231."

The Commission further stated in that report:

"It is possible that its resources may not prove to be sufficient to carry it on and into better times. But its record in the past and the nature of its difficulties are such as to lead us to believe that the applicant's present need is not reorganization of capital structure so much as it is an opportunity with reasonable aid to work out its problems."

This aid has now been supplied from the *actual earnings* as shown by the Supplemental Record.

In another report of the Commission dated September 29, 1934 (*Chicago & North Western Railway Company Reconstruction Loan,* 202 I. C. C. 271), the Commission said:

"In view of the conservative relation of the applicant's debt to probable property valuation, and its high earnings previous to the present depression, we are of the opinion that a financial reorganization of the applicant is not required in the public interest at this time."

The views expressed by the Commission in the above reports, plus the changed conditions in the cash position and current assets deserve a reconsideration of the Plan which was adopted when the corporation was temporarily embarrassed.

III.

The Debt Of The Reconstruction Finance Corporation Should Be Paid And The Pledged Omaha Bonds Aggregating $45,186,000 Should Be Subjected To The Lien Of The Convertible Bonds.

Point II of the brief in support of the petition in the instant case urged upon this Court that the Convertible

Bonds were entitled to a lien on the Omaha bonds aggregating $45,186,000, which were pledged as security by the Debtor with the Reconstruction Finance Corporation. It was urged that the Debtor wrongfully pledged this security with the Reconstruction Finance Corporation, when such bonds belonged to the Convertible Bond Owners, and that if the pledge be deemed proper, the Convertible Bond Owners should be entitled to the equity, after payment of the debt to the Reconstruction Finance Corporation. Now it appears that there is sufficient money on hand to discharge the whole debt to the R. F. C. and the point made by the petitioners in their brief on the right of the Convertible Bond Owners to be subrogated to the lien on the Omaha bonds has much greater force. We ask this Court, therefore, to consider the status of the cash position of the Debtor, as of the present date, in connection with the argument in the petition on the right of subrogation, irrespective of the affirmance of the plan in any other respects.

For the foregoing reasons, we urge the issuance of the Writs.

MEYER ABRAMS,
Counsel for Louis Susman, et al.,
Convertible Bond Owners,
Petitioners.

SHULMAN, SHULMAN AND ABRAMS, and
NORMAN ASHER,
Of Counsel.

CERTIFICATE OF SERVICE OF COPIES OF MOTION ON COUNSEL FOR RESPONDENTS.

I, Meyer Abrams, Counsel for the Petitioners herein, hereby certify that copies of the foregoing motion and annexed brief were duly served on each of the attorneys of record by mailing printed copies thereof by regular United States Mail, postage prepaid, on April 1, 1943.

MEYER ABRAMS.

Dated at Chicago, Illinois,
this 1st day of April, 1943.

FILED
MAY 10 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

PETITION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR, FOR REHEARING.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Counsel for Chicago and North Western Railway Company, Debtor, Petitioner.

May 7, 1943.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

PETITION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR, FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Chicago and North Western Railway Company, Debtor, petitioner, herein called petitioner, respectfully applies to this Court, pursuant to Rule 33 of the Revised Rules of this Court, for a rehearing of the

decision of this Court, denying its petition for writs of certiorari, and shows in support thereof, as follows:

I.

This Court denied the petition for writs of certiorari on April 19, 1943. On April 27, 1943, petitioner presented to the District Court of the United States for the Northern District of Illinois a motion for leave to file a petition for an order, either directing the Trustee of Debtor's estate to pay the claim of the Reconstruction Finance Corporation, which, as of December 31, 1942, principal and interest at 4 per cent, amounted to $48,322,687.15, with directions to the clerk of the District Court to transmit the proceedings to the Interstate Commerce Commission to consider modification of the plan of reorganization made necessary by such payment, or, in the alternative, for an order directing the clerk of the District Court to transmit the proceedings to the Interstate Commerce Commission for consideration of a modified plan of reorganization which shall provide for the payment of the claim of the Reconstruction Finance Corporation in cash, and distribution of the securities allocated to Reconstruction Finance Corporation under the plan among creditors and/or stockholders of the Debtor, a copy of which petition is attached hereto as "Appendix A."

II.

The District Court denied the said motion, a copy of the order denying the motion being attached hereto as "Appendix B." Filed herewith is a certified copy of said order and of the transcript and certificate of evidence of all the proceedings had in the District Court

on the motion for leave to file said petition, and said transcript is attached hereto as "Appendix C."

III.

The action of the District Court refusing leave to file said petition was based upon the fact that in motions filed herein by petitioner to supplement the record in this Court, there had been included statements of the cash position of Debtor's estate and that request was made that, if the petition for writs of certiorari be denied, the mandate of this Court should

> "definitely provide that such action is taken without prejudice to the exercise of equitable jurisdiction of the District Court in accordance with Section 77. Such a proviso is necessary to dispel any doubt that the District Court might otherwise have that it is not within its jurisdiction to entertain such petition."

During the hearing in the District Court on the motion for leave to file the petition for an order directing the Trustee to pay the claim of the Reconstruction Finance Corporation in full and/or for an order remanding the proceedings to the Commission for consequent modification of plan, as appears in the transcript of such hearing, counsel objecting to the filing of the petition, stated (see page 25 hereof):

> "Now, Mr. Walter has said to your Honor that surely there is jurisdiction in this Court to do what he requests. I think Mr. Walter has admitted within a month, in the Supreme Court of the United States, that this Court does not have any such jurisdiction.
>
> "It may surprise this Court to know that Mr. Walter has filed five briefs in the Supreme Court, in the course of a year—the last on April 1st, the

last four of those briefs within three and one-half months. And in the last brief that he filed, he argued—as he did in every one of those briefs, this matter of paying the R. F. C.; and in the very last brief he specifically asked the Supreme Court, if it denied certiorari, to reserve in its denial, in its mandate, jurisdiction in this Court, so that it could act upon this motion which he then contemplated filing.

"Now, there has been filed in this Court today, the Supreme Court's unqualified denial of certiorari, made in the face of that specific request; and so I say it stands conceded that this Court does not have jurisdiction—and we ask that an order be entered on those two grounds."

That the District Court was controlled in its conclusion not to permit the filing of the petition above referred to, by the fact that this Court had failed to attach to its decision denying petition for writs of certiorari any provision, such as was requested by counsel for the Debtor, is shown by the following excerpt from the transcript of proceedings (pages 31-32):

"THE COURT: Well, now, in this petition—Have you concluded?

"MR. WALTER: I think that is all.

"It may be, if the Court has any doubt about whether this should be filed, that we ought to file a memorandum of authorities. It is an important matter.

"THE COURT: No. I don't think it is necessary, unless your answers to my questions change my view.

"MR. WALTER: I didn't get the Court's statement.

"THE COURT: I don't think it is necessary to file a memorandum of authorities, unless your answers to the questions which I am about to propound may change my views.

"MR. WALTER: All right.

"THE COURT: In this petition that you are presenting this morning, you make the statement

that there has been a change in the financial position of the debtor.

"MR. WALTER: Yes.

"THE COURT: For the better.

"MR. WALTER: We say now there is eighty millions on hand, aside from working capital and so forth.

"THE COURT: You presented those same facts to the Supreme Court?

"MR. WALTER: No.

"THE COURT: How?

"MR. WALTER: There is a difference now, in that there is more cash on hand now than there was then.

"THE COURT: The list presented to the Supreme Court showed how much?

"MR. WALTER: I think it was some seventy millions.

"THE COURT: Well, there couldn't be much change since the first of April.

"MR. WALTER: Well, several millions of dollars a month increase in the cash position."

(Pages 33-34):

"THE COURT: I am familiar with those cases which say that until discharge, orders, judgments and decrees in bankruptcy do not have that finality which pertain to other orders and decrees after term-time. I am familiar with those cases. But there have been two orders in this case, one approving the plan and one confirming the plan, both of which have all the finality that an order in bankruptcy can have. And those orders have been approved and affirmed by the Circuit Court of Appeals of this Circuit, and the Supreme Court has declined to interfere.

"Now, it is always desirable that the Court be right. That is the first principle that should govern. But it also is desirable that a court's actions should be seemly. And if the action can be right and seemly at the same time it is desirable.

"Now, it seems to me that it would be unseemly for me to make any change in this plan after the Circuit Court of Appeals of this Circuit has said

that it is a good plan and should be put into effect, and after the Supreme Court of the United States has declined to interfere with that judgment.

"It would seem to me to be unseemly to do that, and I certainly should not do that unless I thought there was some overpowering reason to compel me to do that; and I don't think that that overpowering reason exists here."

IV.

The order attached hereto as "Appendix B," provides:

"* * * and the Court having heard arguments of counsel in support of and in opposition to said motion, and having considered the mandates of the Circuit Court of Appeals filed this day affirming the orders of the Court approving and confirming the plan of reorganization herein, pursuant to the denial herein of all petitions for certiorari by the Supreme Court on April 19, 1943, and being fully advised in the premises,

"It Is Ordered that the motion of Chicago and North Western Railway Company, Debtor, for leave to file said petition be, and it hereby is, denied."

V.

Under the decision of this Court in Docket Nos. 11-19, 32, *Group of Institutional Investors et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company et al.*, and Docket Nos. 7, 8, 20, 33, and 61, *Ecker et al.* v. *Western Pacific Railroad Corporation et al.*, it is settled law that the Interstate Commerce Commission alone can prescribe the plan of reorganization. The original plan of reorganization in the instant case was certified by the Commission to the District Court under date of December 19, 1939 (Tr. 3503); that plan with some mod-

ification was again certified to the District Court on April 8, 1940 (Tr. 3661); as of September 30, 1939 (the nearest date for which balance sheet was available to the Commission prior to the decision of the Commission), the cash on hand in the Debtor's estate was $12,253,685 (Tr. 1369); as of the close of business on April 19, 1943, there was in the Debtor's estate more than $80,312,688 in cash and cash items (page 12 hereof) available for payment of claims such as that of the Reconstruction Finance Corporation.

VI.

Under the decisions of this Court, in cases such as the pending one, it is necessary that the final plan of reorganization shall reflect present-day conditions. Therefore, the Interstate Commerce Commission should have an opportunity to determine, in view of the tremendous amount of cash now available for payment of claims, whether the plan should be modified so as to require the payment of the claim of the Reconstruction Finance Corporation in cash, in whole or in part, and change of the structure in such plan of reorganization to reflect such payment.

VII.

If it be true that this Court by its decision herein, denying petition for writs of certiorari, expressed no opinion as to the right of the District Court to consider a petition for modification and intended to express no opinion of this Court or restriction upon the jurisdiction of the District Court to consider the changed cash position of the Debtor's estate, it seems necessary and desirable that this Court grant a rehearing herein and

make clear in its decision that the District Court should receive and consider a petition such as was presented to the District Court on April 27, 1943.

Wherefore, petitioner, Chicago and North Western Railway Company, Debtor, respectfully prays that, pursuant to Rule 33 of the Revised Rules of this Court, a rehearing of the decision of this Court of April 19, 1943, be granted, and that the proceedings be remanded with directions to the District Court either (a) to consider the petition of April 27, 1943, above referred to, or (b) to remand the proceedings to the Interstate Commerce Commission to consider revision of the plan of reorganization to give effect to payment of the claim of the Reconstruction Finance Corporation in whole or in part.

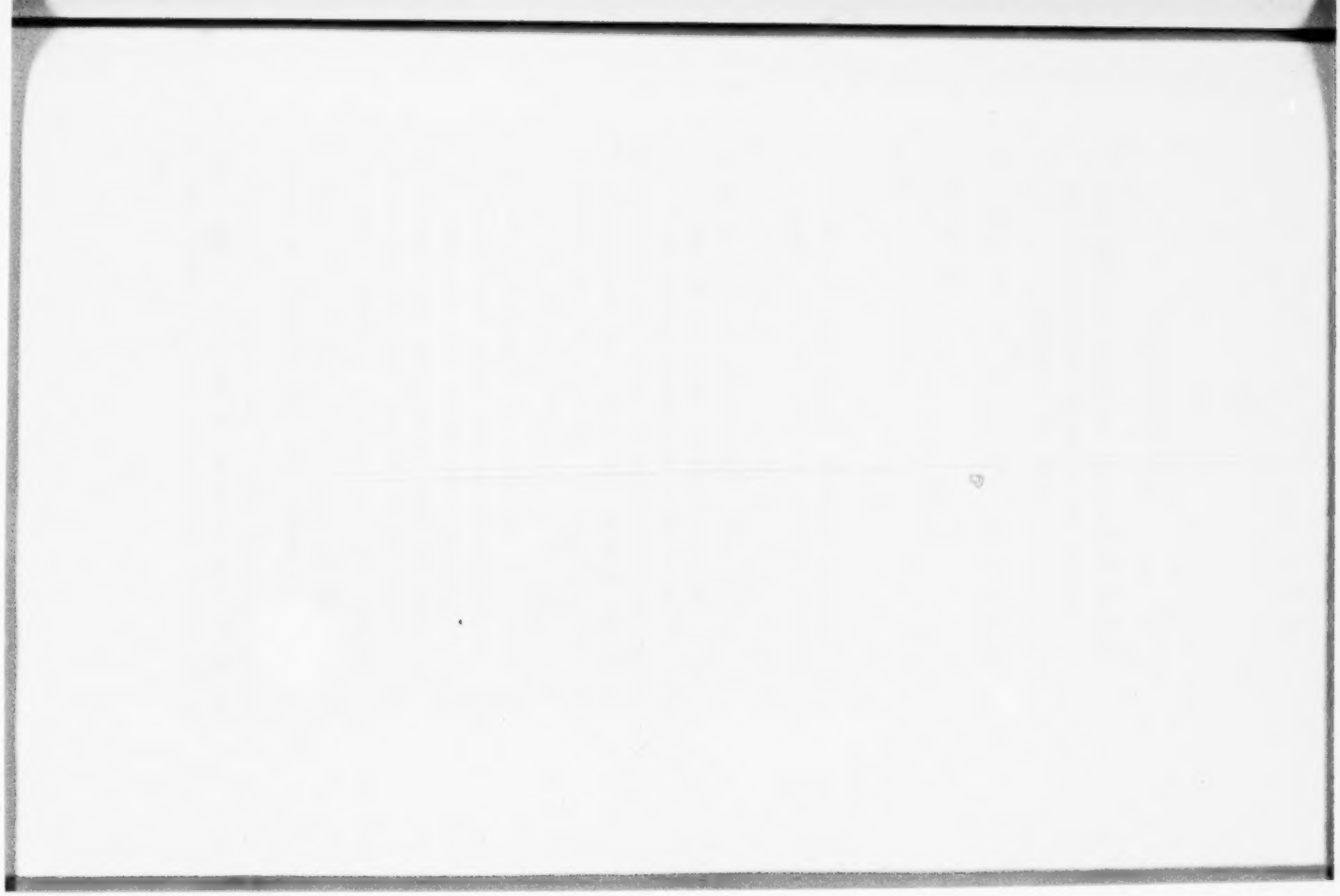
Respectfully submitted,

HELEN W. MUNSERT,
LUTHER M. WALTER,
Counsel for Chicago and North Western Railway Company, Debtor, Petitioner.

AFFIDAVIT.

I, Luther M. Walter, counsel for petitioner, Chicago and North Western Railway Company, Debtor, certify that the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

LUTHER M. WALTER.



APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Proceedings for the Reorganization of a Railroad.

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Debtor. } No. 60448

Petition of Chicago and North Western Railway Company, Debtor, for an order directing Charles M. Thomson, Trustee, to pay in cash the claim of the Reconstruction Finance Corporation with interest at 4 per cent, and for an order transmitting the proceedings to the Interstate Commerce Commission for such modification of the plan of reorganization of the debtor consequent upon payment of said claim; or, in the alternative, for an order transmitting the proceedings to the Interstate Commerce Commission directing said Commission to consider, and report to the Court, whether, under present circumstances, the plan of reorganization heretofore certified to this Court by the said Commission shall be modified to provide for the payment in cash of the claim of the Reconstruction Finance Corporation with interest at 4 per cent, and further modification of the plan of reorganization required by such payment.

Now comes the Chicago and North Western Railway Company, Debtor, by Helen W. Munsert and Luther M. Walter, its attorneys, and respectfully represents to the Court:

1. The plan of reorganization of the Debtor certified by the Interstate Commerce Commission and approved by this Court provides for the issuance to the Reconstruction Finance Corporation of the following items of securities as of January 1, 1939, in settlement of its claim for principal amount of notes, of $42,250,133 and accrued interest of $6,934,772, in accordance with the rates of 5 per cent and 6 per cent as stated in the notes:

Securities of reorganization company allocated with full ownership in R.F.C. (Tr. 3677):		
Fifteen-year secured notes	$25,000,000	
First and general mortgage bonds, Series A	7,783,180	
Second mortgage convertible income bonds, Series A, 4½ per cent	12,114,530	
Preferred stock, Series A, 5 per cent	15,543,462	
Common stock, no par (stated at $100 a share)	23,259,836	
Total		$83,701,008
Securities given unconditionally to R.F.C. (Tr. 3701):		
Union Pacific Railway Company preferred stock, par value	$ 2,085,000	
New York Central Railroad Company 4 per cent bonds, 1998	64,000	
New York Central & Hudson River Railroad Company 4½ per cent bonds, 2013	100,000	
Total		2,249,000

Securities given as collateral to secure $25,000,000 of 15-year notes (Tr. 3701):		
Chicago and North Western Railway Company equipment trust 4½ per cent, Series Y certificates	$ 104,000	
Chicago, St. Paul, Minneapolis & Omaha Railway Company first mortgage, Series A, 5 per cent, due 2000	45,186,000	
Chicago, St. Paul, Minneapolis & Omaha Railway Company equipment trust 4¾ per cent Series I certificates	128,000	
Indiana Harbor Belt Railroad Company capital stock	1,520,000	
Sioux City Bridge Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	945,800	
Superior Coal Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	2,000,000	
Total		49,883,800
Grand Total		$135,833,808

2. As of September 30, 1939, (the nearest date to the date of the Commission's decision certifying plan of reorganization) as appears from the balance sheet of the Debtor's estate (Tr. 1369), there was in the Debtor's estate under the control of Charles M. Thomson, Trustee, cash as follows:

(708) Cash	$11,845,755.76	
(709) Temporary cash investments	—	
(711) Special deposits	408,110.00	
Total		$12,253,865.76

3. As of July 31, 1940, (the nearest date to date of opinion of District Court) as appears from the balance sheet of the Debtor's estate (Tr. 4077), there was in the Debtor's estate under the control of Charles M. Thomson, Trustee, cash as follows:

(708) Cash	$16,559,621.04
(709) Temporary cash investments	—
(711) Special deposits	439,383.94
Total	$16,999,004.98

4. As of the close of business on April 19, 1943, there was in the Debtor's estate under the control of Charles M. Thomson, Trustee, cash as follows:

(708) Cash	$44,893,086.45
(709) Temporary cash investments	28,451,181.25
(711) Special deposits	6,968,420.64
Total	$80,312,688.34

On the foregoing items of cash, Debtor's estate is receiving no interest other than on temporary cash investments, on which interest is at the rate of $\frac{1}{8}$ of one per cent per annum.

5. The indebtedness to the Reconstruction Finance Corporation as of December 31, 1942, principal and interest at 4 per cent, amounted to $48,322,687.15. This Court by its order of March 29, 1943, authorized the Trustee to pay such interest on the new securities for the period ending December 31, 1942, approximating $1,617,356.00.

6. Petitioner further shows that the said plan of reorganization of the Debtor made provision for Class 16, holders of 20-Year $4\frac{3}{4}$ Per Cent Convertible Bonds of 1949, Series A, in the amount of $45,860,390, leaving a balance of principal and interest as of January 1,

1939, unprovided for under the plan of $40,790,910. No provision in the plan of reorganization was made for participation by either the holders of preferred stock of the Debtor company in the aggregate par value of $22,395,000, or by the holders of common stock of the Debtor company in the aggregate par value of $158,-440,300.

7. Petitioner alleges that payment of the claim of the Reconstruction Finance Corporation as above set forth was not provided for in the plan of reorganization as certified by the Interstate Commerce Commission, and as approved by this Court, for the reason that at the time of such certification by the Commission and at the time of such approval by the Court cash was "not available."

Petitioner is informed and upon such information and belief alleges that adequate cash for the payment of said claim of the Reconstruction Finance Corporation is now available and that such payment is in the interest of creditors of the Debtor's estate, in the interest of Debtor's estate, and is in the public interest.

WHEREFORE, petitioner prays that an order be entered herein authorizing and directing Charles M. Thomson, Trustee, to pay in cash the claim of the Reconstruction Finance Corporation as above set forth and directing the clerk of this Court to transmit the proceedings to the Interstate Commerce Commission for its consideration of modification of the plan of reorganization so as to permit such payment in cash and distribution of securities allotted to the Reconstruction Finance Corporation under the plan heretofore certified, to creditors and/or stockholders of the Debtor; or, in the alternative, for an order directing the clerk of this Court to transmit the proceedings to the Interstate Commerce

Commission for consideration of a modified plan of reorganization which shall provide for the payment of the claim of the Reconstruction Finance Corporation in cash and distribution of the securities, allocated under the certified and approved plan of reorganization to the Reconstruction Finance Corporation, among creditors of the Debtor and/or stockholders of the Debtor.

Respectfully submitted,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR.
By HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Petitioner.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Luther M. Walter, being first duly sworn, on oath deposes and says that he is one of the attorneys for the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof and that the same are true as to his knowledge and belief.

LUTHER M. WALTER.

Subscribed and sworn to before me this 21st day of April, 1943.

ARLETA THOMPSON,
Notary Public.

APPENDIX B.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In a Proceeding for the Reorganization of a Railroad.

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Debtor.
No. 60448.

ORDER.

This matter coming on for hearing upon the motion of Chicago and North Western Railway Company, Debtor, for leave to file a petition praying that an order be entered herein authorizing and directing Charles M. Thomson, Trustee, to pay in cash the claim of the Reconstruction Finance Corporation and directing the clerk of this Court to transmit the proceedings to the Interstate Commerce Commission for its consideration of modification of the plan of reorganization so as to permit such payment in cash and distribution of securities allotted to the Reconstruction Finance Corporation under the plan heretofore certified, to creditors and/or stockholders of the Debtor; or, in the alternative, for an order directing the clerk of this Court to transmit the proceedings to the Interstate Commerce Commission for consideration of a modified plan of reorganization which shall provide for the payment of the claim of the Reconstruction Finance Corporation in cash and distribution of the securities, allocated under the certified and approved plan of reorganization to the Reconstruction Finance Corporation, among creditors of the Debtor and/or stockholders of the Debtor, and the Court hav-

ing heard arguments of counsel in support of and in opposition to said motion, and having considered the mandates of the Circuit Court of Appeals filed this day affirming the orders of the Court approving and confirming the plan of reorganization herein, pursuant to the denial herein of all petitions for certiorari by the Supreme Court on April 19, 1943, and being fully advised in the premises,

IT IS ORDERED that the motion of Chicago and North Western Railway Company, Debtor, for leave to file said petition be, and it hereby is, denied.

ENTER: BARNES,
Judge.

Dated: April 27, 1943.

APPENDIX C.

United States of America
Northern District of Illinois
Eastern Division, at Chicago

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION, AT CHICAGO

IN PROCEEDINGS FOR THE
REORGANIZATION OF A RAILROAD

In the Matter of
CHICAGO AND NORTH WESTERN
RAILWAY COMPANY,
Debtor. } No. 60448.

TRANSCRIPT OF PROCEEDINGS
AND
CERTIFICATE OF EVIDENCE

The following is a Shorthand Report and Transcript of the Proceedings had in the above-entitled cause before Hon. John P. Barnes, one of the Judges of said Court, beginning at the hour of 10:00 o'clock a. m. on Tuesday, the 27th day of April, A. D. 1943, pursuant to Notice, upon the Motion of Chicago and North Western Railway Company, Debtor, for leave to file a petition for an order directing Charles M. Thomson, Trustee of the Debtor's estate, to pay off the claim of the Reconstruction Finance Corporation, with interest at 4 per cent, and for an order trans-

mitting the proceedings to the Interstate Commerce Commission for consideration of modification in the plan of reorganization of the Debtor consequent upon the payment of the said claim of the Reconstruction Finance Corporation; or, in the alternative, for an order transmitting the proceedings to the Interstate Commerce Commission with directions promptly to consider and report upon whether, under the present circumstances, the plan of reorganization of the Debtor should be so modified as to provide for the payment, in cash, of the claim of the Reconstruction Finance Corporation with interest at 4 per cent, and consequent modification of the plan insofar as securities are concerned that may be required or authorized by the said payment in cash of said claim.

PRESENT:

Trustee of Property of Debtor:
Charles M. Thomson, *pro se,*
(400 W. Madison St., Chicago, Ill.)
Life Insurance Group Committee:

Messrs. Sidley, McPherson, Austin & Burgess,
(11 S. LaSalle St., Chicago, Illinois),
represented by Kenneth F. Burgess, Esq., Douglas F. Smith, Esq., and George Ragland, Jr., Esq.

DEBTOR:

Luther M. Walter, Esq., and
Helen W. Munsert,
(135 S. LaSalle St., Chicago, Ill.)

Interveners, Helen S. Asher, Louis Susman, Lesch C. and Cuba E. Forrest, (Individual Bondholders),
Meyer Abrams, Esq. and Norman Asher, Esq.,
(134 N. LaSalle St., Chicago, Ill.)
represented by Norman Asher, Esq.

George P. Bovenizer, Charles F. Batchelder and John E. Rovensky, As a Committee Representing Holders of Collateral Notes of Chicago and Northwestern Railway Company:
Messrs. Cravath, deGersdorff, Swaine & Wood,
(15 Broad St., New York, N. Y.), and
Messrs. Mayer, Meyer, Austrian & Platt,
(231 S. LaSalle St., Chicago, Ill.),
represented by H. T. Brown, Esq.

Irving Trust Company (Successor Trustee under Indenture of Milwaukee and State Line Railway Company):
Messrs. Davies, Auerbach, Cornell & Hardy,
(One Wall St., New York, N. Y.), and
Messrs. Isham, Lincoln & Beale,
(72 W. Adams St., Chicago, Ill.),
represented by James P. Dillie, Esq.

Chemical Bank & Trust Company (Successor Trustee under Indenture of St. Louis, Peoria and North Western Railway Company):
Messrs. Chadbourne, Hunt, Jaeckel & Brown,
(70 Pine St., New York, N. Y.), and
William D. Kerr, Esq.,
(105 S. LaSalle St., Chicago, Ill.),
represented by William D. Kerr, Esq.

United States Trust Company (Trustee under Debtor's General Gold Bond Mortgage of 1987, Debtor's Trust Indenture, dated March 1, 1921, Debtor's Equipment Trust Agreements of 1925, 1927, and 1929:
Messrs. Stewart & Shearer,
(45 Wall St., New York, N. Y.), and
Messrs. Wilson & McIlvaine,
(120 W. Adams St., Chicago, Ill.),
represented by Calvin F. Selfridge, Esq., and Sidney K. Jackson, Esq.

Law Department of Trustee,
(400 W. Madison St., Chicago, Ill.):
Lowell Hastings, Esq.

And other Counsel.

And thereupon the following proceedings were had herein:

THE CLERK: No. 60448. In the Matter of Chicago and North Western Railway Company, Debtor: Motion of Chicago and North Western Railway Company, Debtor, for leave to file a petition for an order directing Charles M. Thomson, Trustee, to pay off the claim of the Reconstruction Finance Corporation, with interest at 4 per cent, and for an order transmitting the proceedings to the Interstate Commerce Commission for consideration of modification in the plan of reorganization of the Debtor consequent upon the payment of the said claim of the Reconstruction Finance Corporation; or, in the alternative, for an order transmitting the proceedings to the Interstate Commerce Commission with directions promptly to consider and report upon whether, under the present circumstances, the plan of reorganization of the Debtor should be so modified as to provide for the payment, in cash, of the claim of the Reconstruction Finance Corporation with interest at 4 per cent, and consequent modification of the plan insofar as said payment in cash of said claim; and to fix the time for answer, and for hearing upon said petition and answers.

MR. WALTER: If your Honor please, the mandate has been received from the Court of Appeals, the Supreme Court having denied the issuance of a writ of certiorari.

THE COURT: What does the mandate say?

MR. WALTER: I beg pardon?

THE COURT: What does the mandate say?

MR. WALTER: Well, the advice from the Clerk of the Supreme Court is that the motions for leave to

supplement the records in numbers—(and then it gives the numbers), are granted.

The petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit, in all of the cases, are denied.

Now, I am asking leave to file a petition which in the alternative would direct the trustee to pay the claim of Reconstruction Finance Corporation, in cash, and remand the proceedings to the Commission for modification of the plan which would be required by such payment, or in the alternative that the case be remanded to the Commission to consider modification of the plan contemplating the payment in cash, in whole or in part.

At the time—I recite in the petition the cash position, on the theory that a court of equity has a right, when changed conditions have interposed which require action, the court can take such action.

If the court permits the petition to be filed, we expect to prove that at the time the Commission handed down its plan there was approximately twelve and a quarter millions of cash. When this court approved the plan, there was approximately seventeen million dollars, and that on April 19, 1943, there was in excess of eighty million dollars of cash, temporary cash investments and special deposits.

The total amount of the claim of Reconstruction Finance Corporation, with interest at four per cent—and your Honor will recall that they agreed to take four per cent after reorganization had been effected—is slightly more than forty-eight and a quarter million dollars.

The cash, forty-four million, eight hundred and ninety-three thousand, is not drawing any interest at all.

The temporary cash investments are in Government

securities, seven-eighths of one per cent, and certain special deposits of approximately seven million, make the eighty million dollars.

A recent decision by the Court of Appeals of this Circuit, which is not yet reported—March 22, 1943, in the Milwaukee case, recites the facts with reference to the particular matter presented, and then has this to say:

> "Since the proceedings and orders of a Bankruptcy Court are interlocutory until entry of the discharge,"—

and then citing Supreme Court decisions, 297 U. S., 301 U. S.—

> "and may be modified and rescinded before final decree, * * * and if no intervening rights will be prejudiced, the Court may grant a rehearing."

No intervening rights being prejudiced, a petition for rehearing was granted.

Our theory is this, that had the cash been available, as you have stated in your opinion, the claim of the R. F. C. could have been paid.

One hundred and thirty-five million dollars of securities are turned over, eighty-five million of them outright, and the forty-nine million as collateral for a twenty-five million note to the R. F. C.

As your Honor knows, the Federal Government is getting all of the money it can. I cannot see why there should be any objection from the creditors whose status under reorganization will be improved if this is paid. Nobody can be injured.

While the Supreme Court took over a year and a day, and then some, to say "No" to our petition for writs, and did not pass on what we regard as fundamental questions, we still have time to ask them for

rehearing; but it occurs to me, since you have authority in your discretion to send this back to the Commission to consider the plan, that the necessary time ought to be consumed, with the vast interests involved, and the public interest involved, in paying this off, stopping the accumulation of interest, eliminating the Reconstruction Finance Corporation from its control, and operation of this property.

As you well know, in the many plans of reorganization proposed, the institutional investors, Savings Bank groups, and R. F. C. are given the control of the properties.

It is not in the public interest, I submit, for the R. F. C. to have any such control. Here with the adjustment bonds getting something like forty-six million, with forty million untaken care of, with nothing for the preferred stockholders and nothing for the common, when that can be remedied by the simple equitable act of paying this claim and having the Commission revise the plan, it certainly ought to appeal to the equity of the Judge, to your discretion.

Now, we are asking to have you authorize the filing of the petition, and that you direct answers to be filed, and set the case for hearing. I pledge in as far as it is in my power, that I will do everything to expedite the action.

MR. SMITH: Your Honor, we have reached a turning point in this case. We have entered upon a new phase of the proceeding—or hope we have entered a new phase, a phase in which this debtor has no interest. And on behalf of the two groups, and on behalf of the reorganization managers, we would like a few minutes, if we may, to state our position. May we do that?

MR. ASHER: If the Court please, maybe we will

save some of the points that may be raised here on behalf of the convertibles. We would like to join in and adopt Mr. Walter's motion; and we think they have no argument against us, that we have no part in the plan.

THE COURT: Let's see what he has to say. Your request is what?

MR. SMITH: To state the position of the reorganization managers and the groups, on this petition.

THE COURT: How much time do you want?

MR. SMITH: Four or five minutes.

THE COURT: Go ahead.

What do you want to say?

MR. ASHER: On behalf of the convertibles who do participate in the plan, there is no argument about that, we want to join in and adopt the petition and motion of Mr. Walter on behalf of the debtor.

Now, by this action we are not waiving any right we have for rehearing before the Supreme Court. We may file such a petition on the question of fact and the question of subordination and subrogation that we have raised, but as far as the general merits of the plan, we are not against that at all; but on this phase of the question we think that it will benefit all parties, and we are joining in that motion.

THE COURT: Has the mandate been returned? Go ahead.

MR. SMITH: This is a motion for leave to file a petition which seeks to change this plan, your Honor, not to make some adjustment of debt within the framework of the plan, but to change the plan.

Now, we ask the Court not to permit that petition to be filed, but to deny it on two separate and independent grounds. To deny it first on the ground that

the plan has been approved and confirmed by this Court.

As this Court has said, it is a good plan, if not a perfect plan. Above all, it is a lawful plan, and under Paragraph f of Section 77, there is a specific direction to put into effect and to consummate the approved and confirmed plan.

So we ask the Court here to enter an order denying this motion and refusing to entertain the petition on the ground, first, that he does not desire to see a change of this plan which he has approved and confirmed.

Secondly, we ask the Court to refuse to entertain this petition on the ground that he has no jurisdiction to entertain it. We believe that there is no jurisdiction in this Court or in any court, to change this plan, now that it has been finally and authoritatively confirmed.

There is jurisdiction only to make such minor adjustments in the debt structure as can be done within the framework of the plan or to make those minor changes which the Commission contemplated, changes of the sort that it referred to as minor corrections and omissions, changes which this Court reserved jurisdiction to make.

Now, Mr. Walter has said to your Honor that surely there is jurisdiction in this Court to do what he requests. I think Mr. Walter has admitted within a month, in the Supreme Court of the United States, that this Court does not have any such jurisdiction.

It may surprise this Court to know that Mr. Walter has filed five briefs in the Supreme Court, in the course of a year—the last on April 1st, the last four of those briefs within three and one-half months. And in the last brief that he filed, he argued—as he did in every

one of those briefs, this matter of paying the R. F. C.; and in the very last brief he specifically asked the Supreme Court, if it denied certiorari, to reserve in its denial, in its mandate, jurisdiction in this Court, so that it could act upon this motion which he then contemplated filing.

Now, there has been filed in this Court today, the Supreme Court's unqualified denial of certiorari, made in the face of that specific request; and so I say it stands conceded that this court does not have jurisdiction—and we ask that an order be entered on those two grounds.

Now, there is one other point in this matter which we think we must make, inasmuch as this motion records a continuance of the debtor's efforts in this case after the final determination by the Supreme Court, in its refusal to accept the case.

The debtor's position in this litigation, your Honor, has been described by this Circuit Court of Appeals in its opinion which Mr. Walter got from that Court in the proceedings in which he finally obtained authority from your Honor to permit the expense of this appeal.

In its opinion the Circuit Court of Appeals has described what the position of the debtor would be in the event it should be determined that there was no interest in the stock, an event which has now transpired.

Here is what the Circuit Court of Appeals said:

> "If the stockholders have no interest in the debtor, due to its failure to show assets sufficient to pay its debts, then, the court would be unwarranted in taking funds, belonging to the creditors, but inadequate to pay all creditors' claims in full, and permit stockholders to prolong the litigation and increase the costs and expenses of administering the debtor's estate. To do this would be to

> place a premium on the efforts of those who are capitalizing on nuisance value, and no premium should be placed on the efforts of those who specialize in creating nuisance values. Their ingenuity, panurgy, and persistence need no encouragement."

Now this Court, almost immediately after it approved this plan, expressed the view very strongly that, in the public interest and in the light of the private interests involved, there ought to be an appeal from the Court's decision and a full review of that decision.

The Court believed it had no power to grant funds, in advance of the action by the Interstate Commerce Commission thereon, to carry on that appeal; but the Court did think it ought to be done, and said so strongly, and, under the authority of the Circuit Court of Appeals, in an opinion with which the Court was unable to agree but was cheerfully anxious to follow, this Court provided funds for this appeal.

Those funds were made full use of, as I have said. We have had a feverish, frantic activity in the Supreme Court in the last four months, which culminated in the filing of four briefs by Mr. Walter, in which this question was completely argued.

Now here we are discussing again the same matter. The debtor has had its day in court, only in a quaint sense: It has had eight years in court. We hope the Court will find it appropriate to say now, just as he made it clear to everybody before that there ought to be a full opportunity to make and have a full appeal, that, having had that opportunity, and a full appeal having been had, and a complete and full decision having been made by the Circuit Court of Appeals, and appeal therefrom to the Supreme Court of the United States allowed, and that appeal denied by the

Supreme Court, that now the matter should finally be ended. And we hope the Court will find it appropriate to say now that no more litigation is going to be financed by the estate on behalf of those who have been found to have no interest, and the name of the North Western is not to be used for that purpose, and the show is over, and the curtain has been rung down, and we are entering on a different phase of this proceedings namely, the task of consummating this plan.

And we suggest, your Honor, if that is not done, the chances are that we will be constantly finding it necessary to turn aside from the work in consummating the plan, to deal with the activities of those who have no interest in this proceeding; and we ask the Court to use its good offices to prevent that.

MR. BROWN: If the Court please, may I say, on behalf of the Bovenizer Committee, representing the collateral noteholders, that we concur in the argument advanced by Mr. Smith.

MR. WALTER: May I ask if the R. F. C. is prepared to state its position?

Apparently they have nothing to say.

I just have this to say by way of reply.

The petitions for certiorari were granted in the Milwaukee, and Western Pacific cases. No action was taken on the North Western. And as the months went by, and the position of the North Western improved, I filed motions to supplement the record, by introducing balance sheets and certificates of the Comptroller as to cash on hand, and so forth.

As further months went by I repeated that action.

All of those have been received.

Now, in the December 17th motion to supplement

the record, after stating the facts, "the plan of reorganization has not yet become"—reading from that motion—"has not yet become effective."

> "The plan of reorganization has not yet become effective. Should this Court deny writs of certiorari herein, and fail to require payment of the debt due the Reconstruction Finance Corporation, the debtor corporation desires to present to the District Court a petition for an order directing the Trustee to pay the claim of the Reconstruction Finance Corporation. * * * Prayer is therefore made that, should the petition for writs of certiorari be denied, the mandate of this Court will definitely provide that such action is taken without prejudice to the exercise of equitable jurisdiction of the District Court in accordance with Section 77.
>
> "Such a proviso is necessary to dispel any doubt that the District Court might otherwise have that it is not within its jurisdiction to entertain such petition."

Now, I plead guilty to having done my best to get the Supreme Court to let us present our case and at least to have a memorandum from that Court which would express some of the views of that Court on the matters involved in this case that were not involved in the Milwaukee, or the Western Pacific.

I do not know why it held the case so long, and why it sent it back without any action. But perhaps the Court was conscious of its own decisions in bankruptcy cases, that the Court did have jurisdiction to entertain any motion, practically, for conditions which have changed the position of the debtor, so that this position could be shown.

The Interstate Commerce Commission, under the recent decisions, is the only party that can make a plan of reorganization.

It seems to me that in a very short time that Com-

mission could say to this Court whether it thought there ought to be a modification of the plan to give effect to the payment of the Reconstruction Finance Corporation loan.

The Court said that you could not do anything but present a plan or make suggestions.

I pointed out to the Court that four modifications in the plan were made by the decree of this Court, unopposed by anybody, but the Interstate Commerce Commission alone can make the plan.

But they say nothing in this case of the application of the principle laid down in the Milwaukee case, that the Commission must O. K. the plan in every syllable.

So I am asking this Court, in the protection of the rights of everybody, including those who are here opposing it, by paying up now, in advance of twelve months from today.

The Commission pointed out, in one of its decisions, that the North Western had a uniform record for fifty-four years of having paid its dividends, and even up to 1934 it had done that. But in 1934 it came upon the times that we all did in this country.

Now, the cash is there. It can be paid. Nobody can be injured, and those creditors who have participated in the plan can be strengthened in their position, and then the equity interests can stand in line.

Too much has this Government of ours become, and is becoming, a government of men rather than of laws; and we appeal to your judgment, your discretion, to send this case back to the Commission, even though it take a few months. Better that than be wrong. And I urge you to allow us to present the petition in any way that might appeal to the Court, with or without any change.

I would like to have the Interstate Commerce Commission's position upon this petition. No one can be hurt.

THE COURT: Well, now, in this petition—Have you concluded?

MR. WALTER: I think that is all.

It may be, if the Court has any doubt about whether this should be filed, that we ought to file a memorandum of authorities. It is an important matter.

THE COURT: No. I don't think it is necessary, unless your answers to my questions change my view.

MR. WALTER: I didn't get the Court's statement.

THE COURT: I don't think it is necessary to file a memorandum of authorities, unless your answers to the questions which I am about to propound may change my views.

MR. WALTER: All right.

THE COURT: In this petition that you are presenting this morning, you make the statement that there has been a change in the financial position of the debtor.

MR. WALTER: Yes.

THE COURT: For the better.

MR. WALTER: We say now there is eighty millions on hand, aside from working capital and so forth.

THE COURT: You presented those same facts to the Supreme Court?

MR. WALTER: No.

THE COURT: How?

MR. WALTER: There is a difference now, in that there is more cash on hand now than there was then.

THE COURT: The list presented to the Supreme Court showed how much?

MR. WALTER: I think it was some seventy millions.

THE COURT: Well, there couldn't be much change since the first of April.

MR. WALTER: Well, several millions of dollars a month increase in the cash position.

MR. ASHER: The motion is double-barrelled, in that the first motion is for a change in the plan.

MR. SMITH: No; both phases of this motion contemplate a change in the plan, Judge. Mr. Walter would not have been so dishonest as to tell this Court that there would not be a change in the plan, and he so stated.

MR. ASHER: As far as the convertibles are concerned, we don't think so. It is in the alternative: to direct the Trustee to pay, and then send it back to the Commission; or to send it back to the Commission to report to you.

MR. WALTER: Our position is, if the Court please, that the payment of the R. F. C. will save interest to the estate, will benefit all the other creditors, and, under any plan, our theory is that all the Commission has said, is, "Well, reorganize the debt structure"; but that does not prevent the debtor from paying in advance if it has the funds. That still does not change the plan.

MR. SMITH: Well, your Honor, the money this debtor has on hand, as we showed the Supreme Court, is necessary to make effective the plan. This money is there for distribution, pursuant to the purposes of that plan. And if the money is taken to pay the R. F. C., then it just is not there to do the things the plan contemplates, and it is for that reason that Mr. Walter says this contemplates a change in the plan, and I think it is perfectly obvious it does.

MR. WALTER: I don't agree with the gentleman at all. I submit, under my analysis of the books of account and my discussions with those who are responsible for it, that everything required to make this a going concern can be done after cash payment has been made, at four per cent, to the R. F. C.

THE COURT: I am familiar with those cases which say that until discharge, orders, judgments and decrees in bankruptcy do not have that finality which pertain to other orders and decrees after term-time. I am familiar with those cases. But there have been two orders in this case, one approving the plan and one confirming the plan, both of which have all the finality that an order in bankruptcy can have. And those orders have been approved and affirmed by the Circuit Court of Appeals of this Circuit, and the Supreme Court has declined to interfere.

Now, it is always desirable that the Court be right. That is the first principle that should govern. But it also is desirable that a court's actions should be seemly. And if the action can be right and seemly at the same time it is desirable.

Now, it seems to me that it would be unseemly for me to make any change in this plan after the Circuit Court of Appeals of this Circuit has said that it is a good plan and should be put into effect, and after the Supreme Court of the United States has declined to interfere with that judgment.

It would seem to me to be unseemly to do that, and I certainly should not do that unless I thought there was some overpowering reason to compel me to do that; and I don't think that that overpowering reason exists here.

I think the plan is a good plan. It is unfortunate

that the debtor had debts, but if it hadn't had debts it would not have been here. It is probably no more unfortunate that it owed money to the Reconstruction Finance Corporation than if it had owed it to any other corporation. But the fact is it did owe that Corporation a large sum of money, and accordingly the plan called for the delivery to that Corporation of a large amount of securities.

I thought the plan was good. I still think it is good. It is very fortunate that the Road is accumulating some cash wherewith to meet the obligations of the plan, give it a good start upon what we hope will be a long course of prosperity and long life. But I can't see any reason, there is no reason that I can see, why I should change the plan, and certainly no overpowering reason to cause me to appear to overrule the Circuit Court of Appeals of this Circuit, and the Supreme Court of the United States.

Now, that is one of the phases of the situation.

Now, that decree confirming that plan, having all the finality that any judgment in bankruptcy can have prior to a final discharge, determined that your client has no interest in this property, and that judgment has been affirmed by the Supreme Court of the United States.

Now, perhaps you will say, "Well, the debtor has the moral duty to see that its debt is paid and that, therefore, I have the right to stand here and say, upon behalf of my client, the debtor, that it should be paid."

I can't see any other right that it has. The order confirming the plan cut off the rights of the preferred stockholders and the rights of the common stockholders. Everyone here agrees that it was unfortunate that that was necessary. But it was necessary, and accordingly, it was done.

The corporation had a right to speak for its creditors, no doubt, yet I have always understood that it has been speaking here primarily upon behalf of the stockholders. But their lawsuit is over. Their lawsuit is closed; unless some court which controls my actions tells me to the contrary, the stockholders' lawsuit is over.

There must be an end to everything, and I think the end has come to that lawsuit.

I can't see any good purpose to be served by prolonging this controversy.

I was desirous that your client should be given every opportunity to be heard, not only here but in the reviewing courts, very, very anxious it should have that opportunity. But they have had it, and that lawsuit is over.

The motion will be denied.

MR. SMITH: May I present an order, your Honor?

THE COURT: Yes.

MR. SMITH: Your Honor, may I say this much more?

This matter having been decided, I think it will be of interest to the Court, and I think the record ought to show it: There are two principal mortgages on this property, the general and the first refunding, the one on the western road and other on the eastern road. Those are the two senior debts.

I think the Court will be interested to know that for the four years after the effective date of this plan, that is, 1939, 1940, 1941 and 1942, which includes this bulge in earnings due to the war business, to the end of 1942, we took all those earnings—I am speaking of the brief we filed in the Circuit Court of Appeals—

and we found out what would accrue to the general mortgage bondholder per thousand dollars of claim, if every penny that was available for dividends was paid out which, of course, it would not be. But we went on that assumption, and we found out that the general mortgage bondholders would get, per thousand dollar claim, 2.98 per cent interest during those four years; and that the refunding bondholders, per thousand dollar claim, would get approximately 2.46 per cent interest for that four-year period.

I thought you might be interested in knowing that, your Honor.

THE COURT: Yes; that is interesting.

MR. WALTER: Your Honor, may I be indulged just a moment further on this statement?

THE COURT: Yes.

MR. WALTER: As I understand and as I have regarded my duty as counsel for the debtor—

THE COURT: Yes.

MR. WALTER: (Continuing) —it seems to me that my action in this case should look first to the satisfaction of the debt, and that is the motion I make here, which would satisfy that debt in full to the debenture holders, and if anything were left it would go to the stockholders. I have tried to advise the Court on what I regarded as pertinent matters. I have been pleased to render service. I do think, with all due deference to the Court, that the Interstate Commerce Commission, whose business it is to make the plan, would have been glad to modify the plan, as suggested by you in your opinion in 1940, if the cash were available, and the cash is now available. It was not then available. It is now available.

I think that is all I can say.

(Which were all the proceedings had in the above-entitled cause at the time and place aforesaid.)

AND FORASMUCH as the matters and things above set forth do not otherwise fully appear of record in this cause, Charles M. Thomson, Trustee, tenders this Certificate of Evidence and Transcript of Proceedings had in said cause on the 27th day of April, A. D. 1943, and prays that the same may be certified under the hand and seal of the Judge of this Court, and thereby made a part of the record in such cause; which is accordingly done this 5th day of May, A. D. 1943:

John P. Barnes, (Seal)
Judge.

CERTIFICATE OF CLERK.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss:

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Order entered April 27, A. D. 1943, and Transcript of Proceedings and Certificate of Evidence filed May 5, A. D. 1943 in the Matter of CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor, No. 60448, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 5th day of May, A. D. 1943.

ROY H. JOHNSON,
Clerk.

By ANN G. JOYCE,
Deputy Clerk.

(Seal)

(16)

FILED
MAY 10 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 37-38

In the Matter of
CHICAGO AND NORTH WESTERN RAILWAY CO.,
Debtor,
LOUIS SUSMAN, et al., Convertible Bond Owners,
Petitioners,

VS.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,
Respondents.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

MEYER ABRAMS,
Counsel for Louis Susman, et al., Convertible Bond Owners, Petitioners.

SHULMAN, SHULMAN & ABRAMS, and
NORMAN ASHER,
134 N. LaSalle Street,
Chicago, Illinois,
Of Counsel.

May 10, 1943.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, ET AL.,
Respondents.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION OF LOUIS SUSMAN, ET AL., CONVERTIBLE BOND OWNERS, FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Louis Susman, *et al.*, convertible bond owners herein, apply to this Court for rehearing from the order entered April 19, 1943, denying the prayer for writs of certiorari, and in support of the petition for rehearing, say:

Petitioners presented two issues of fact to the District Court which were never presented to the Interstate Commerce Commission, and on which it had no opportunity to pass because the petitioners were not parties to the hearings before the Commission prior to the adoption of the plan of reorganization. Petitioners did not know these facts at the time of the Interstate Commerce Commission hearings, and did not discover them until after the plan had been approved and presented to the District Court for confirmation. The issues are of great importance by reason of certain decisions which were published since the denial of the writs.

Under the ruling made by this Court in the Milwaukee Railroad reorganization (63 S. Ct. 727) such issues should have been presented to the Interstate Commerce Commission for its consideration. A rehearing should be granted so that the petitioners may have the opportunity to present them to the Commission. The issues are:

(a) whether the convertible bondholders were entitled to impress a trust on the $45,186,000.00 refunding bonds of the "Omaha," which were acquired by the debtor with funds supplied by the convertibles, and

(b) whether the convertible bonds which were entitled to 4¾% interest to the maturity of the loan and a bonus of 5% for retirement prior to maturity, were properly classified in the same class with general creditors who were not entitled to such rights.

This Court decided in the *"Milwaukee"* case (63 S. Ct. 727, 752) that *"minorities under §77 • • • cannot be deprived of the benefits of the statute by reason of a waiver, acquiescence, or approval by the other members of the class."* This rule should be applied to the instant case because the issues were never presented to the Interstate

Commerce Commission. One issue was presented to the District Court and considered in its opinion (35 F. Supp. 230, 254). However, this issue was not considered by the Circuit Court of Appeals. The other issue was not even considered by the District Court, and under the remandment order in the *Milwaukee* case, such issue should also be considered now.

In the "Milwaukee" opinion this Court remanded the case to the District Court with instructions to remand the case back to the Commission to determine certain facts with respect to the priorities between the general mortgage bonds and the 50-year bonds. The same rule should apply to the convertible bonds in the instant case, whose lien might be superior to that of other creditors on the bonds of $45,186,000.00 of the "Omaha," and also because of the preferential claim of the Convertibles over general creditors.

The rule of law announced in the *"Milwaukee"* case, that where senior creditors obtained the face value of their securities in inferior securities, they are entitled to additional securities for the surrender of their superior right, should apply with equal force in the instant case as it relates to their position as against the position of general creditors.

I.

The Right to Subrogation Or to Impress a Trust on the Refunding Bonds of the "Omaha" of $45,186,000.00 Should Be Considered By the Interstate Commerce Commission, and Should Have Been Squarely Passed Upon By the Court of Appeals, and a Rehearing Should Be Granted on This Issue.

The "Omaha," a wholly owned subsidiary of the debtor, was indebted on various liens for $45,186,000.00.

Its parent, the debtor, caused the "Omaha" to execute, on May 1, 1929, a "refunding" bond issue secured by a trust indenture which was to become a first lien upon the "exchange" of the "refunding bonds" for the existing bonds and the release of the existing liens. After the execution of the trust indenture, but before it obtained authority to issue the refunding bonds from the Commission, the debtor sold $72,335,000.00 of the Convertible bond issue to the public and *used* $45,186,000.00 *of the proceeds realized from the sale of these bonds to discharge the existing liens on the Omaha Railroad, but did not exchange the "refunding bonds" for the Convertible bonds,* whose funds were used to accomplish this object. The refunding bonds were kept in the treasury of the debtor, which notified the bankers who floated the convertible bonds on the market, that *it would keep the* $45,186,000.00 *Omaha refunding bonds in its treasury* in connection with the issue of the Convertible bonds (R. 4198, Exhibit 3).

Because of these facts, petitioners contended in the District Court that the debtor became *trustee* for the Convertibles. It had no right to pledge these bonds with the Reconstruction Finance Corporation, or, at any rate, the Convertibles were entitled to impress a lien or a trust on the equity in these bonds above the debt due to the Reconstruction Finance Corporation, if the R. F. C. be deemed an innocent party.

It was also urged that by reason of the provisions of the trust indenture securing the Convertible bonds, to the effect that the debtor would insert appropriate provisions for the security of the convertible bonds in the event of the creation of new liens, it became its duty to do so when it acquired the consent from the Commission to issue the refunding bonds, since the lien securing such

bonds commenced only after the permission given by the Commission for their issuance, which was *subsequent* to the sale of the Convertibles. The lien *thereby created constituted a new lien or encumbrance;* as is more fully discussed in the petitions for issuance of writs of certiorari (pages 24-41).

Since the denial of the writs of certiorari on April 19, 1943, there was published in the Advance Sheet of May 1, 1943, the opinion in *Kankakee Federal S. & L. Ass'n* v. *Arnove,* 318 Ill. App. 261, where the Court considered the doctrine of "conventional subrogation." There it said (p. 269):

> "The reason underlying the rule was stated as follows: "This equitable principle is enforced solely for the accomplishment of substantial justice where one has an equity to invoke which cannot injure an innocent person." This principle has been applied when money was advanced to pay off a prior mortgage and a judgment creditor claimed a lien superior to that of the new mortgagee who advanced the money. Citing *Tyrrell* v. *Ward,* 102 Ill. 29."

The Interstate Commerce Commission, which has the primary duty to adopt reorganization plans under §77, treated the Convertibles as unsecured creditors. The issue presented to the District Court on this point was never presented to the Interstate Commerce Commission and escaped its attention. The District Court did consider this issue (35 F. Supp. 230, 254), but under the ruling of this Court it was its duty to refer the matter to the Commission for its consideration. The Circuit Court of Appeals did not consider this issue, as more fully appears from its opinion. The issue was squarely presented to the Circuit Court of Appeals by the statement of points, and argued in the Brief.

This issue is of extreme importance now in view of the fact that it appears from the supplemental record which this Court allowed to be filed simultaneously with the denial of the petitions for certiorari, that the debtor then had on hand over $63,000,000.00 in cash, and the entire debt of the Reconstruction Finance Corporation, in excess of about $48,000,000.00, could now be paid out of the cash so that the debtor could repossess itself of the $45,186,000.00 "Omaha" refunding bonds, and the rights of the convertibles to impress a trust on the "Omaha" bonds or to be subrogated to their lien would place the convertible bondholders in a completely different class.

It also appears from the debtor's petition for rehearing, and from the record attached thereto, that the cash on hand now exceeds $80,000,000.00, and that the debtor has made an application to the District Court for an order directing that the debt to the Reconstruction Finance Corporation be paid. These petitioners have joined in such request, which request was denied by the District Court, but this order is not yet final as it is subject to appeal.

We believe that the payment of the Reconstruction Finance Corporation will not change the structure of the plan. It will not prejudice any of the creditors, but instead will bring them benefits of the savings of interest, and greater participation in debtor's assets and earnings. The approval of the plan prevents the creditors from requiring payment of their claims in advance of the maturities fixed, but should not prevent the reorganized railroad or the Trustee from paying off the debts sooner where the money is available. This should also be done in order to place the Convertibles in the *status quo* so that they may resort to the $45,186,000.00 Omaha bonds and

impress a trust thereon because such bonds were issued for "refunding" and "exchange" purposes and for no other purpose.

The writs of certiorari should, therefore, be issued to preserve the rights of the petitioners and in order to present the entire subject matter to the Interstate Commerce Commission for its due consideration.

II.

The Question of the Reclassification of the Convertible Bonds With General Creditors Was Not Considered By the Interstate Commerce Commission in the Adoption of Its Plan.

The convertible bonds were entitled to 4¾% interest to the maturity of the bond issue and to a premium of 5% plus accrued interest in the event of the retirement prior to maturity. *General creditors were not entitled to such rights.* The Commission treated the Convertible bonds in the same class with general creditors, which cannot be justified under any theory of law.

The provision *to pay interest to maturity of a bond issue is a substantive right* which placed such bondholders in a *different* class from general creditors (*New York Trust Company* v. *Securities and Exchange Commission,* 131 F. 2d, 274, 276). The treatment accorded to the Convertible bonds who were entitled to a premium of 5% plus accrued interest at 4¾% for the retirement of the bonds prior to maturity in the same class with general creditors, *cannot be said to be "fair and equitable"* (*City National Bank & Trust Company* v. *Securities and Exchange Commission,* 134 F. 2d, 65, 66-67). While in the above case the Court justified the action because the

retirement was *involuntary* and it held that the provision was inapplicable to an involuntary retirement, it is applicable here because the appeal was taken from the approval of the plan *prior* to its confirmation, and creditors were entitled to vote upon a "fair and equitable plan."

As stated before, this issue was not presented to the Commission as the petitioners were not parties to such proceedings prior to its adoption of the plan. The issue was presented to the District Court, but the Court evidently failed to note it as it was not even discussed in its opinion. The issue was also not considered by the Circuit Court of Appeals. The subject matter was discussed in the petition for the writs of certiorari under Point II (pp. 22-24).

We are not seeking a rehearing in order to upset the entire plan, but only for the purpose of submitting to the Interstate Commerce Commission these two propositions of fact so that the Convertible bond owners, who were allowed so little participation and whose claim for over $40,000,000.00 was wiped out because of the failure to have these issues and facts presented to the Interstate Commerce Commission, might obtain better treatment.

For the foregoing reasons we urge that a rehearing be granted.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Louis Susman, et al., Convertible Bond Owners, Petitioners.

SHULMAN, SHULMAN & ABRAMS, and
NORMAN ASHER,
134 N. LaSalle Street,
Chicago, Illinois,
Of Counsel.

Certificate of Counsel.

The undersigned, Meyer Abrams, counsel for the petitioners herein hereby certifies that the foregoing petition was prepared by him and that he is of the opinion that the petition is well founded in point of law and is not interposed for purposes of delay.

Dated at Chicago, Illinois, this 10th day of May, A. D. 1943.

Certificate of Service of Copies of Petition on Counsel for Respondents.

I, Meyer Abrams, counsel for the petitioner herein, hereby certify that copies of the foregoing petition were duly served on each of the attorneys of record by mailing printed copies thereof by regular United States mail, postage prepaid on May 10, 1943.

Chicago, Illinois,
May 10, 1943.

MAY 12 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

Nos. 1087, 1088, 1089 62 - 64

In the Matter

of

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Debtor.

IRVING TRUST COMPANY, as Successor Trustee under the First Mortgage of Milwaukee and State Line Railway Company,
Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, LIFE INSURANCE GROUP COMMITTEE, *et al.*,
Respondents.

Petition of Irving Trust Company, as Trustee Under First Mortgage of Milwaukee and State Line Railway Company, for Rehearing and Vacating of Order Denying its Petition for Writ of Certiorari

HAROLD C. MCCOLLOM,
Attorney for Irving Trust Company, as Trustee under First Mortgage of Milwaukee and State Line Railway Company.

Dated, N. Y., May 10, 1943.

APPEAL PRINTING CO., INC., 120 CEDAR ST., NEW YORK, WO 2-3242

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

NOS. 1087, 1088, 1089

In the Matter

of

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Debtor.

IRVING TRUST COMPANY, as Successor Trustee under the First Mortgage of Milwaukee and State Line Railway Company,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, LIFE INSURANCE GROUP COMMITTEE, *et al.*,

Respondents.

Petition of Irving Trust Company, as Trustee Under First Mortgage of Milwaukee and State Line Railway Company, for Rehearing and Vacating of Order Denying its Petition for Writ of Certiorari

Irving Trust Company (hereinafter termed the Trustee), as Trustee under First Mortgage of Milwaukee and

State Line Railway Company (hereinafter termed State Line), respectfully applies to this Court, pursuant to Rule XXXIII, for a rehearing and for the vacating of the order made by this Court on April 19, 1943, denying the Trustee's petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. The opinion of the Circuit Court of Appeals affirming the District Court has now been reported in 126 F. (2d) 351.

Questions Requested to Be Heard

After the filing of this Trustee's petition for certiorari, this Court, on March 15, 1943, rendered its opinions in the *Western Pacific Railroad Company* and *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* cases. While these opinions appear to have disposed of some of the grounds upon which certain petitions for certiorari in the present case were based, they do not dispose of equally important questions raised by this Trustee's certiorari petition; but, on the contrary, they supply strong additional reasons why this Court should determine whether the Circuit Court of Appeals erred by affirming the action of the District Court

(1) in refusing to determine and give effect to the lien of the State Line Mortgage upon the earnings of the mortgaged property;

(2) in giving to the junior mortgages upon the State Line property the benefit of State Line earnings without satisfying the prior lien of the State Line Mortgage;

(3) in basing the treatment of the State Line bonds entirely upon severance studies although there was no possibility of severance;

(4) in confirming a railroad reorganization plan as against a class of bondholders entitled to vote, without the $66\frac{2}{3}$ vote of such class provided for in Section 77(e), merely upon a general determination that the plan is fair and equitable and without making the specific determinations as to the non-assenting class which Section 77(e) requires as a condition of confirmation; and whether

(5) the Circuit Court of Appeals erred in refusing to determine the merits of the objections made by the State Line Trustee.

Grounds of this Petition

1. The Circuit Court of Appeals erred by affirming the action of the District Court in refusing to determine and give effect to the lien of the State Line Mortgage upon the earnings of the mortgaged property.

Certain segregation studies were introduced by the Debtor before the Commission and were stated by the Commission to reflect "as close an approximation as possible to the divisions of joint rates which would have normally been applied if the individual mortgage lines had been separately operated railroads" (R. 3571). Based upon such studies, extended to cover further periods, the Debtor's Comptroller prepared an exhibit (introduced at the hearing before the District Court on confirmation of the plan, R. 5451-5452) from which it appeared that the State Line net earnings (available for interest) for the period from July 1, 1935 (the approximate date of institution of the reorganization proceeding) to April 30, 1941 (the approximate date of the hearing in the District Court on confirmation of the Plan) amounted to $2,424,177. Under the segregation studies the State Line covered its interest requirements by a larger margin than any other

mortgage division (R. 4126-7). It has never been questioned that the State Line Mortgage was a prior lien on the State Line net earnings from the inception of the proceeding. Such earnings amounted almost to the total principal amount ($2,500,000) of the State Line bonds—which matured by their terms on January 1, 1941. No recognition has been given to such earnings either by the Plan or in any other way.

No recognition was given to such earnings in the Plan as transmitted to the District Court and approved and confirmed by it. The Commission recognized the rule of the Seventh Circuit, set forth in the *Wakey* case, that income is impounded for mortgagees by the inception of a bankruptcy proceeding, and said that "there seems no escape from the conclusion that payments out of such funds should be made to the lien holders in the order of their priority" (R. 3669). It refused to consider such earnings in allocating securities under the Plan and stated in substance that the effect of the impounding was a matter for the court (R. 3666). The District Court, by approving and confirming the Plan, also refused to give any weight therein to such earnings; and the Circuit Court of Appeals affirmed.

Nor did the courts below, by means other than the Plan, give any recognition to this lien.[1] If, as is usual in Section 77 cases, the District Court had directed the payment to the State Line bondholders of their net earnings, or a large part thereof, it would not have erred in refusing to give to the bondholders, by the Plan, the bene-

1. Subsequent to the hearing on confirmation the District Court directed certain payments to the State Line bondholders, in common with all other bondholders to which new bonds had been allocated by the Plan; but the amounts of such payments were computed on the basis of earnings applicable on the new securities and were trivial as compared with the impounded net earnings. Except for the last-mentioned payments, the last interest payment on these bonds was made on January 1, 1935 (R. 1773).

fit of the same earnings. However, both the District Court and the Circuit Court of Appeals refused to give any form of benefit to the State Line bondholders. After the first refusal of the District Court to direct any interest payment on the State Line bonds (although by the same order interest payments to other mortgagees were directed), the Trustee appealed to the Circuit Court of Appeals. It dismissed the appeal upon the ground that the District Court's order was not final—even though payments to other mortgagees had been finally directed—inasmuch as the District Court had reserved the power to protect later the State Line rights (114 F. (2d) 963). Having thus been told by the Circuit Court that its remedy was to apply to the District Court for relief, the Trustee several times did so. The District Court continuously refused to consider the matter; and hearing thereon was finally postponed until the date of hearing upon the approval of the Plan (R. 4562). When it approved the Plan it dismissed the application of the Trustee as moot, without any hearing on the merits (R. 5094). The appeals which were decided by the Circuit Court of Appeals (126 F. (2d) 351) included the appeal of the Trustee from the refusal of the District Court to adjudicate and give effect to the lien on earnings; but the Circuit Court's opinion does not mention this matter beyond listing such appeal among the other appeals (126 F. 2d at 353).

At the hearing on approval the District Court, in connection with the impounded earnings contributed by State Line, stated in substance (R. 5018) that such earnings should be calculated on the basis of what the State Line might earn under certain "severance" studies. The severance studies were supported before the Commission and the District Court by an expert for the Group Committees, who testified at the hearing on approval of the

Plan (R. 4358) that one month previously, in the *Wabash Railway Company* receivership case, he had stated that he would not use severance studies to determine the past earnings of a property. Another expert testified at said hearing that such studies can have no effect on past earnings (R. 4133-4). Severance studies, which are intended to estimate earnings under a theoretical future method of operation, cannot be used to determine earnings from actual past operation. No expert testimony is necessary as a basis for such conclusion; but the only testimony in the present case is that just referred to. Independent of the extent to which severance studies may have been used, in other cases, to determine the allocation of new securities, it is the practice in Section 77 proceedings to determine past net earnings by segregation studies; and we believe that in no case other than the present one have severance studies been used for such a purpose.

In the *Western Pacific* case this Court emphasized the necessity for determining and giving effect to mortgage liens. In the *St. Paul* case this Court directed that the cause be remanded to the District Court for the determination, among other things, of the question whether certain properties were covered by the general mortgage or by the 50-year mortgage. The decision of the Circuit Court of Appeals in the present case erroneously approves the action of the Commission and the District Court in destroying the lien of the State Line Mortgage upon earnings of large amount. The State Line bondholders are entitled to the benefit of such earnings, either by way of appropriate changes in the Plan or by way of cash payment.

2. The Circuit Court of Appeals erred by affirming the action of the District Court in giving to the junior mortgages upon the State Line property the benefit of State Line earnings without satisfying the prior lien of the State Line Mortgage.

Although the First and Refunding Mortgage was to a minor extent a beneficiary of the transfer of the State Line's "excess of segregation earnings over final measure of its earnings", the chief beneficiary of such transfer was the General Mortgage. The Plan, while basing its treatment of the State Line bonds upon severance studies alone, gives to the General Mortgage bonds the benefit of most of the segregation earnings of the State Line remaining after deducting the State Line severance earnings. Based upon the segregation earnings for the average depression year used in the calculation, $292,000 of State Line earnings were transferred to the General Mortgage (I.C.C. Ex. 594, p. 8; R. 3249). These State Line earnings (after certain minor modifications) were then used as a part of the base for computing the General Mortgage bondholders' share of new fixed-interest securities, while the severance share of the State Line bondholders was originally $45,000 (I.C.C. Ex. 594, p. 8)—later increased to $51,000 (R. 3244). Similarly, in connection with the allocation of the new income bonds, the same exhibit (later modified in minor respects) for the normal prospective year credited the General Mortgage with $516,000 of State Line segregation earnings (I.C.C. Ex. 594, p. 12).

It was clearly contrary to legal standards and to the requirements of Section 77 that, without satisfying the State Line bonds in full for principal and interest, the Plan should give to the General Mortgage bonds a large

amount of securities by reason of their junior claim upon the State Line segregation earnings while denying to the State Line bonds any benefit from their own segregation earnings. Such treatment is directly contrary to the views expressed by this Court in the *St. Paul* and *Western Pacific* opinions. In the *St. Paul* case, this Court said that the property of one group cannot be "subtly appropriated to pay the claims of another" (87 L. ed. at 713).

3. The Circuit Court of Appeals erred by affirming the action of the District Court in basing the treatment of the State Line Bonds entirely upon severance studies although there was no possibility of severance.

We have noted the language in the *St. Paul* opinion with reference to the use by the Commission of segregation, severance, and contributive income studies, and the holding therein that the studies to be used as a basis for the allocation of new securities are ordinarily matters "for the informed judgment of the Commission and the District Court"; also the holding that the question of the studies to be made is for the Commission "initially" to decide "in the light of the requirements of a particular case" (87 L. ed. at 714). Inasmuch as severance studies have no logical reason for existence in a case wherein severance is a practical impossibility, a question of law is presented as to whether severance studies may properly be used as the sole basis for the treatment of the State Line bonds (if such studies may be used at all) in such a case. The record herein shows that no severance was ever contemplated[2]; that the total reproduction cost less depreciation of the State Line amounted to $3,433,530;[3] that it was

2. R. 3191, 3175-6, 3195.
3. I.C.C. Ex. 217, R. 1608.

built to avoid the very routing which would result from a severance[4]; that operation over the State Line has been highly efficient[5]; that the delay resulting from the theoretical rerouting would be likely to result in the loss of a large amount of the traffic carried[6]; that any proposal to avoid paying $87,500 annual interest to the State Line bondholders by spending a minimum of $1,994,755 (and probably much more)[7] in order to reroute the traffic and recreate the operating conditions which the State Line was built to avoid would be a practical absurdity. Under many decisions of the Commission and of the courts, expenditures for the construction of such a route would not be permitted if any management were insane enough to contemplate so doing. Between the time of the Commisson hearings and the time of the court hearings in the present case the expert who presented the severance studies to the Commission on behalf of the Group Committees testified in another case that severance is entitled to relatively little weight where the possibility of severance is remote (R. 4361).

We are not seeking to reargue any questions decided in the *St. Paul* case. Even if this Court did intend to imply that severance studies designed only to estimate earnings under a theoretical future method of operation may be used, in some cases, as the measure of earning power in spite of the provision in Section 77(e) requiring that due consideration be given to the earning power "past", present and prospective, we do not believe that this Court intended to be understood as approving reorganization allocations based upon severance studies

4. R. 3176, 1639-40.
5. R. 5509, 3190, 4110.
6. R. 1639, 1642, 3149, 3176.
7. I.C.C. Ex. 578, R. 3058, 3124, 3170, 4117-8.

in a case such as the present one, wherein severance would be impossible. Severance studies are extremely speculative and, as used herein, they are revolutionary. If the use of severance studies is to be approved, such use should be carefully restricted. Otherwise, they can be used to destroy investments in divisional mortgage bonds. Such investments are made in the light of the traffic carried over such lines, without any reason to think that the Commission and the District Court—as in the present case—may cut away the position of such bonds by supposing the discontinuance of the efficient line securing such bonds and the substitution of a less efficient new route to be constructed. This is another way of accomplishing the result condemned in the *St. Paul* case—that is, the appropriation of the property of the underlying bondholders.

4. The Circuit Court of Appeals erred by affirming the action of the District Court in confirming a railroad reorganization plan as against a class of bondholders entitled to vote, without the 66-2/3% vote of such class provided for in Section 77(e), merely upon a general determination that the plan is fair and equitable and without making the specific determinations as to the non-assenting class which Section 77(e) requires as a condition of confirmation.

Section 77(e) states that, after the vote of creditors, the Court may confirm the plan if it has been accepted by two-thirds in amount of the allowed claims of each class voting on the plan,

> "*Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the

> interests or claims of those rejecting it; *that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts;* and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e); * * *". (Italics supplied by counsel.)

In the *Western Pacific* case this Court said (87 L. ed. at 664) regarding the 1935 amendments to Section 77:

> "* * * While the most important amendment was to furnish means to avoid the obstruction of dissatisfied classes of creditors or stockholders by making a fair and equitable plan effective over dissenters, the requirement of coordinated action by Commission and court was retained."

This language in the *Western Pacific* opinion, combined with denial of certiorari in the present case, may indicate that the so-called "cram-down" provision may be enforced by the District Court merely upon a determination that the Plan is fair and equitable. This would scrap the express proviso in Section 77(e) that the "cram-down" provision may be enforced only if the Court shall also determine that the rejection "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts". If Section 77(e) is to be thus emasculated, the elaborate and expensive procedure for voting upon a plan is wasted effort, because the initial determination that a plan is fair and equitable would nullify any effect of the voting. We do not believe that this Court intended any such inference to be drawn. The proper interpretation of the proviso above mentioned is novel, is presented to this Court for the first time, and is of great importance in pending railroad reorganizations in which the plans have not been submitted to vote.

The desirability of such an interpretation is emphasized by the particular facts in the present case. 50.37% of the voting State Line bonds were in favor of the Plan and 49.63% opposed. Out of the $1,067,000 of bonds voted in favor of the Plan, $1,000,000 were voted by a member of the Life Insurance Group (R. 5390-3)—which Group was heavily interested in the General Mortgage bonds (R. 5390-3). The Group Committees were largely responsible for the theory under which the State Line's earnings were taken from it and credited to the General Mortgage; and they proposed the allocations which were made by the Commission in the Plan. In spite of this and many other facts, such as those hereinabove mentioned, the District Court paid only lip service to the proviso, recognizing no distinction (so far as anything in the record shows) between the question of whether the plan was fair and equitable and the question of whether the rejection was reasonable. The Circuit Court of Appeals, although it expressed doubt as to the fairness of the Plan to the State Line bondholders and thus gave support to the reasonableness of the rejection, mentioned but did not discuss the matter of reasonableness. In fact, as shown under heading 5 hereof, it refused to consider even the merits of the objections to the Plan. Instead, it criticized the dissenting bondholders and the Trustee for objecting and held in substance that the holder of some $1,000,000 of the $2,500,000 of outstanding State Line bonds—which holder, with other holders,[8] had requested the Trustee to appeal—should accept, without complaint, what the large majority of the system bondholders approved.

8. While the Circuit Court referred to only one bondholder as objecting, the fact was that other bondholders also objected in the District Court (R. 4562-3, 4146-7) and requested the Trustee to appeal.

5. The Circuit Court of Appeals erred in refusing to determine the merits of the objections made by the State Line Trustee.

The objections made by the State Line Trustee and hereinabove mentioned involve questions of law; and they do not depend upon any disputed questions of fact. Nevertheless, the Circuit Court of Appeals refused to determine the merits of such objections, holding in substance that it need not consider such objections, because (a) it must accept the conclusion of the Commission; (b) the holders of other bonds of the system favor the Plan; (c) the holders of a majority of the voting State Line bonds favor the Plan; (d) the objecting bondholders represented only a small percentage of the Debtor's total indebtedness; and (e) the existing position of the objecting bondholders would be bettered because they would be more likely to receive interest and dividends on their new securities.

(As we read the opinion, the Circuit Court may have intended to give the same reasons for not discussing the reasonableness of the rejection of the Plan by the State Line bondholders.)

The Circuit Court stated with reference to the treatment of the State Line bondholders:

> "We confess to the existence of a doubt".

However, it said with reference to such treatment:

> "We must accept the conclusion of the I.C.C. thereon." (126 F. 2d at 370)

Such a holding is contrary to the decisions of this Court in the *St. Paul* and *Western Pacific* cases. In the *Western Pacific* case this Court, although holding that the

decision of the Commission in certain respects is conclusive, said (87 L. ed. at 666) that its determination must be reached "in accordance with legal standards".

The Circuit Court said that it is interested "in the effect of the approval of the plan by the vast majority of the creditors * * * on the various objections which have been raised"; that the voting majority in each group, favoring the plan, was far greater than the two-thirds requirement; that, in respect of those who did not vote, the Court would vote their interest in favor of the plan; that over one-half of the State Line bondholders in volume and number favor the plan; that "one creditor, with a claim of less than one-fourth of one per cent. of the debtor's total indebtedness is attempting to block and defeat the plan"; and that such creditor's position under the plan allocation will be better than its existing position, because its chance of receiving interest and dividends on the new securities will be better (126 F. 2d at 366, 367, 370).

Even if two-thirds of the voting State Line bonds had favored the Plan, the minority were entitled to have the Court comply with the requirements of Section 77; and it would have been error to deprive them "of the benefits of the statute by reason of a waiver, acquiescence or approval by other members of the class" (*St. Paul* opinion —87 L. ed. at 713). *A fortiori,* it was error to treat the rights of the State Line bondholders as affected by the favorable vote of other classes of bondholders.

In so far as the Circuit Court based its refusal to consider the merits of the State Line objections on the small percentage of total system bonds held by the objecting bondholder, such decision is directly opposed to the decision of this Court in the *Los Angeles Lumber Products Company* case, wherein it was held that, upon the "basic

issue'' of the fairness of a plan (under Section 77B), the large percentage of bonds agreeing to the plan was immaterial (308 U. S. at 115), and the plan was sent back upon the objection of less than one per cent. in amount of the bonds.

In so far as the Circuit Court refused to consider the objections because it thought that the objectant would probably receive interest more regularly on the new securities allocated to it, such refusal has no possible justification.

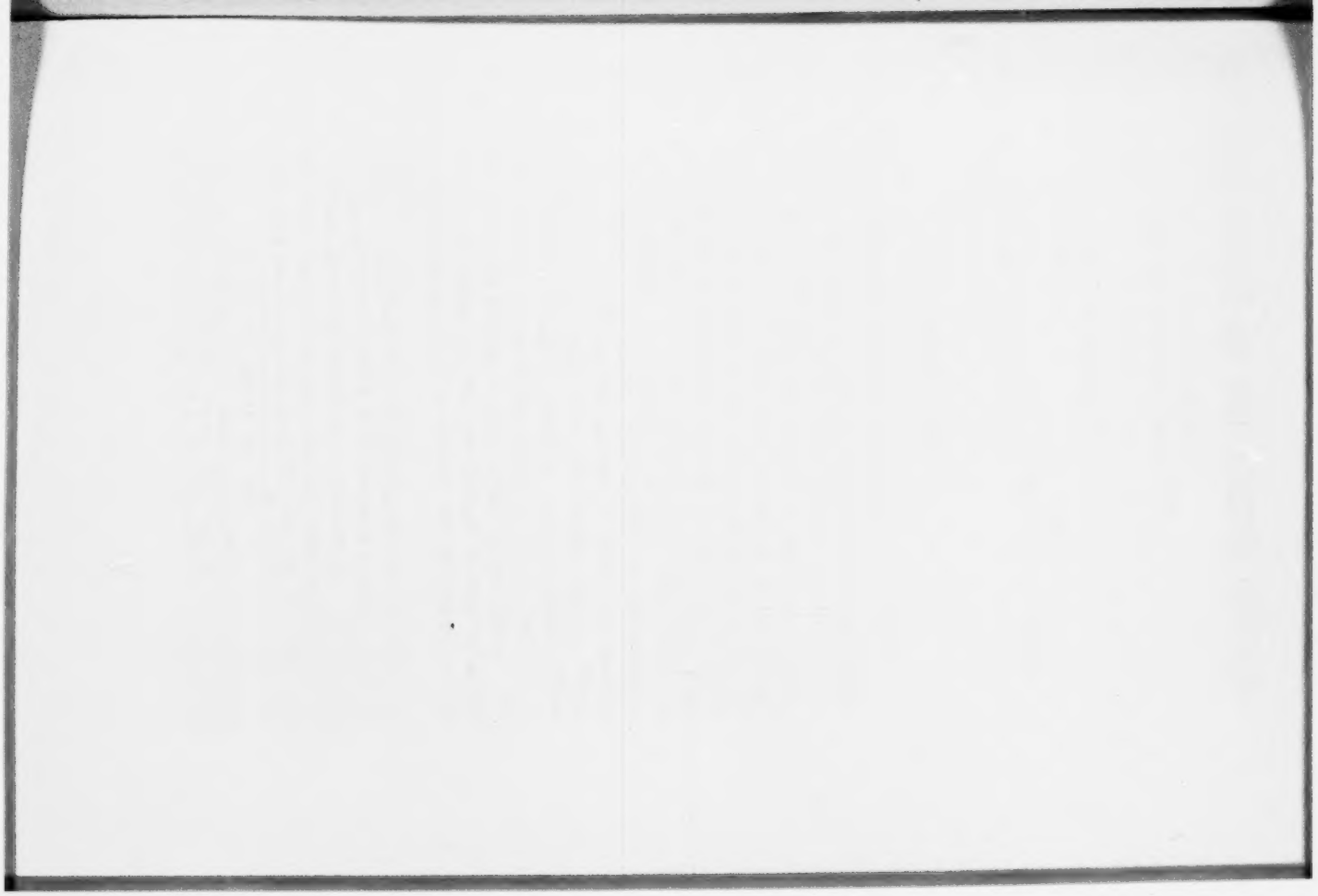
Wherefore, your petitioner respectfully prays reference to its petition for certiorari herein dated March 28, 1942, and respectfully prays that this Court, in respect of the matters above mentioned, grant a rehearing and vacate its order of April 19, 1943 denying this Trustee's petition for certiorari.

Dated at New York, N. Y., this 10th day of May, 1943.

HAROLD C. MCCOLLOM,
Attorney for Irving Trust Company, as Trustee under First Mortgage of Milwaukee and State Line Railway Company.

Certificate of Counsel

I, HAROLD C. MCCOLLOM, attorney herein for the above named petitioner, hereby certify that the foregoing petition was prepared by me and that it is presented in good faith and not for delay.

Dated at New York, N. Y., this 10th day of May, 1943.

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